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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 831

CAMDEN TRUST COMPANY, PETITIONER

v.

RAY M. GIDNEY, COMPTROLLER OF THE CURRENCY
AND
DELAWARE VALLEY NATIONAL BANK
OF DELAWARE TOWNSHIP

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Camden Trust Company petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above case on January 18, 1962.

OPINIONS BELOW

The judgment of United States District Court for the District of Columbia (R. 107)[1] was entered without an opinion. The opinion of the Court of Appeals (App., *infra*, pp. 1a-9a) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals (App., *infra*, p. 10a) was entered on January 18, 1962. A timely petition for rehearing *in banc* was denied by order dated February

[1] Except where otherwise indicated, the record references herein are to the Joint Appendix in the court below.

20, 1962 (App., *infra*, p. 11a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether 12 U.S.C. 36 (c)(2)—the branch banking provision of the National Bank Act—required the Comptroller of the Currency to reject the application for the proposed "new" bank involved in this case on the ground that the application in substance and effect constituted an attempt to obtain a forbidden branch bank.

2. Whether 12 U.S.C. 21-27, the sections of the National Bank Act which empower the Comptroller of the Currency to authorize new national banks, create in the Comptroller an absolute discretion which can be exercised without reference to the provisions or policy of 12 U.S.C. 36(c)(2), the branch banking provisions of the National Bank Act.

3. Whether Congress has conferred authority upon the Comptroller of the Currency knowingly to charter "affiliate" banks.

STATUTES INVOLVED

1. National Bank Act

(a) 12 U.S.C. 36 provides, in pertinent part:

* * *

"(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: * * * (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks. * * *"

(b) 12 U.S.C. 27 provides:

"Certificate of Authority to Commence Banking.—If, upon a careful examination of the facts so

reported, and of any other facts which may come to the knowledge of the Comptroller, whether by means of a special commission appointed by him for the purpose of inquiring into the condition of such association, or otherwise, it appears that such association is lawfully entitled to commence the business of banking, the Comptroller shall give to such association a certificate, under his hand and official seal, that such association has complied with all the provisions required to be complied with before commencing the business of banking, and that such association is authorized to commence such business. But the Comptroller may withhold from an association his certificate authorizing the commencement of business, whenever he has reason to suppose that the shareholders have formed the same for any other than the legitimate objects contemplated by this Chapter. (R.S. § 5169)."

2. New Jersey Banking Act

(a) Section 1(2) of The Banking Act of 1948 of the State of New Jersey (N.J.S.A. 17:9A-1(2)) provides:

"(2) 'banking institution' shall mean a bank, savings bank, and a national banking association having its principal office in this State;"

* * *

(b) Section 19 of The Banking Act of 1948 of the State of New Jersey (N.J.S.A. 17:9A-19) provides, in pertinent part:

* * *

"B. No bank or savings bank shall establish or maintain a branch office which is located outside the municipality in which it maintains its principal office; except that a bank or savings bank may establish and maintain a branch office or offices anywhere in the same county as that in which it maintains its principal office. * * *

"(3) When each proposed branch will be established in a municipality in which no banking institution has its principal office or a branch office."

STATEMENT

Petitioner, a state banking institution, has operated an authorized branch in Delaware Township, New Jersey, since 1953; under the New Jersey Banking Act of 1948, no New Jersey bank could establish a branch in Delaware Township and, pursuant to 12 U.S.C. 36(c)(2), no national bank could establish a branch there.

At an extensive public hearing, held in 1953 on petitioner's application for its branch, the Haddonfield National Bank was the principal objector, asserting that the area involved was well within its own competitive territory; that its facilities were sufficient to meet all banking needs of the area, both at the time and in the future; and that its main purpose in opposing petitioner's application was to avoid competition (R. 80-82).

Since 1953, as Delaware Township has grown, available banking facilities have been expanded and improved; and a new bank, the Cherry Hill National Bank, has been located in the Township (R. 83).[2] Haddonfield National itself, during this period, has established a branch in Voorhees Township on the Delaware Township boundary, a branch in Haddonfield, a branch in Collingswood also adjacent to and serving Delaware Township, and has pending before the Comptroller an application for authority to establish a branch in the neighboring Borough of Stratford (R. 95).[3]

By 1960, Haddonfield National also desired to establish facilities physically within Delaware Township at a pro-

[2] Delaware Township, an area of approximately 25 square miles with a present population of 32,000, now enjoys the services of 12 existing banking offices. The affidavit of Sylvan G. Fletcher (R. 84-87) shows graphically the number of banking facilities readily available and the proximity of Haddonfield National to appellant's branch in the Township and to the site of the proposed "new" bank.

[3] Pursuant to the New Jersey branch banking law, *supra*, p. 3, no New Jersey bank can establish a branch in an area where a national bank has already established a branch.

posed location approximately two miles from Haddonfield's main office and about one mile from petitioner's branch (R. 13, 84). Haddonfield National recognized that it could not establish a branch at the desired location because of the applicable statutes and unsuccessfully sought authority from the Comptroller, under 12 U.S.C. 30, to move its main office to the proposed location in Delaware Township while maintaining its present main office as a branch (R. 6).

Within a few weeks thereafter, an application was made to the Comptroller for the incorporation of a new national bank at the Delaware Township location (R. 7, 39). The nine individuals who signed the application were the nine directors of Haddonfield National (R. 7, 40). The application advised the Comptroller that "* * * under present New Jersey law additional branch offices cannot be opened * * *" but that a "* * * new bank can be organized within the Township * * *" (R. 39). The applicant's first choice for a title was "Haddonfield Suburban National Bank"; in the application the mailing address was that of Haddonfield National, with communications to be addressed to Horace G. Moeller, who is President of Haddonfield National (R. 39).

By letter of November 21, 1960, the Comptroller gave preliminary approval to this application, selecting as the title "Delaware Valley National Bank of Delaware Township", the applicant's second choice (R. 41). Shortly after receipt of this letter, the President of Haddonfield National, on December 8, 1960, sent a circular letter, under the Haddonfield National letterhead, to Haddonfield National's shareholders, urging them to subscribe for the shares of the "new" bank (R. 13-14). The letter stated, *inter alia*, that Haddonfield National could not establish a branch in Delaware Township because of the branch banking law but that the Haddonfield National Board of Directors, as "individuals", had obtained preliminary ap-

proval from the Comptroller to establish a "new bank". The letter further stated that the "new" bank would be an "* * * affiliate of the Haddonfield National Bank and that its affairs would be conducted by the same management and under the same policies as the Haddonfield National Bank". (R. 13).[4]

Upon learning of the Comptroller's preliminary approval, petitioner, on January 3, 1961, filed this suit for declaratory and injunctive relief, challenging the Comptroller's statutory authority to permit the "new" bank to commence the business of banking.[5] Petitioner contended that, as the result of the Comptroller's proposed action, Haddonfield National would, in substance, acquire a branch facility in Delaware Township in violation of 12 U.S.C. 36(c)(2), and that the Comptroller, in approving and proposing to issue a final certificate of authority on this application, was countenancing a plain attempt to evade the controlling statutory provisions of the National Bank Act. Both the National Association of Supervisors of State Banks and the State of New Jersey, appearing *amici curiae* (R. 19, 23, 24, 27), urged that the Comptroller should be enjoined from permitting evasion of the federal and state laws on branching by means of the "new" bank device.

In response, the Comptroller moved for summary judgment (R. 51). Stressing that the only material facts were the application for authorization, the Comptroller's preliminary approval, and the execution by the incorporators of the Articles of Association and Organization Certifi-

[4] The 1960 Annual Report of the Haddonfield National Bank contained language identical with that quoted above, under the heading "Delaware Valley National Bank". (R. 84-85).

[5] An application for a temporary restraining order was filed but not pressed in view of the Comptroller's agreement administratively to stay the issuance of a certificate of authority until the case was heard and decided.

cates,[6] the Comptroller took the position that 12 U.S.C. 36 (c)(2) was inapplicable and that he possessed power to consider and pass upon the application solely by reference to 12 U.S.C. 21-27, those sections of the National Bank Act which deal with the authorization of new banks. Stenographic Transcript of Proceedings in District Court, pp. 6-9. The argument emphasized the form of the application, the separate corporate entity and the absolute discretion of the Comptroller over new bank applications (Stenographic Transcript, pp. 10, 11, 16, 23), concluding that the Comptroller is the "* * * banking power for this nation, and it is his decision in the exercise of his judgment and discretion as to when this certificate of authority should issue * * *." Stenographic Transcript, p. 17.

To meet petitioner's uncontroverted factual showing as to the nature of the proposed new facility, the Comptroller argued that his authority under 12 U.S.C. 21-27 included absolute power knowingly to authorize the establishment of "affiliate" banks, stating that "* * * the approval of a bank which is an affiliate of another bank is certainly within the contemplation of the statute and the power of the Comptroller." Stenographic Transcript, pp. 14-15. Supporting the Comptroller, intervenor stated that "* * * from the start the intention here has been to form an affiliate * * *". Stenographic Transcript, p. 31.[7a]

[6] Subsequent to the filing of this suit, the incorporators, on January 19, 1961, completed Articles of Association and an Organization Certificate (R. 53-61). The incorporators, the entire board of directors of Haddonfield National, became the directors of the "new" bank (R. 53). Thereafter, these papers, together with other proceedings, were forwarded to the Comptroller who, on January 27, 1961, advised Mr. Moeller that the corporate existence of the "new" bank was now established but that, before a charter could issue, certain other steps had to be taken, the case then to have "further attention". (R. 44-46).

[7] The Comptroller did not "* * * act on this application as a branch bank application * * *", since it "* * * wasn't made to him in that manner." Stenographic Transcript, p. 26.

[7a] In addition, both the Comptroller and the intervenor advanced various jurisdictional arguments.

After hearing on cross motions for summary judgment on August 7, 1961, the district court, by an order, dated August 12, 1961, sustained the motions for summary judgment of the Comptroller and intervenor as "• • • a matter of law • • •" (R. 102). The conclusions of law (R. 106), prepared by the Comptroller and adopted by the district court, recited that the Comptroller had absolute discretion to approve the establishment of the intervenor under 12 U.S.C. 21-27 and that the provisions of 12 U.S.C. 76(*a*) were inapplicable to the case. The conclusions further stated that the intervenor, a body corporate, was an instrumentality of the federal government and that the "• • • fact of its affiliation with another banking association does not make it any less a body corporate." The conclusions also held that the Comptroller's discretion under 12 U.S.C. 21-27 was not subject to judicial review, that petitioner was "• • • without standing to challenge the Intervenor's corporate existence", and that petitioner was without standing to challenge the Comptroller's approval of the new bank.

In affirming, Judge Bastian dissenting, the court below stated that it did not discuss the district court's conclusion that petition was without standing. App., *infra*, p. 7a.[8] On the question of the Comptroller's statutory power and duty, the majority below noted that intervenor was a sep-

[8] In the court below, the Comptroller renewed his argument that petitioner lacked standing to challenge his authority to approve a branch or charter a bank, noting that he had unsuccessfully argued to the same effect in *Commercial State Bank of Roseville* v. *Gidney*, 174 F. Supp. 770 (D.C.D.C., 1959), affirmed *per curiam* and petition for rehearing denied, 278 F. 2d 871 (C.A.D.C., 1960). The Comptroller's argument on lack of standing was also rejected in *National Bank of Detroit* v. *Wayne Oakland Bank*, 252 F. 2d 537 (C.A. 6, 1958), *certiorari denied*, 358 U.S. 830 (1958). Although standing was a principal question raised in the National Bank's petition for certiorari in *Wayne Oakland* (Oct. T., 1958, No. 216, Petition for Certiorari, pp. 25-29), no petition was filed on behalf of the Comptroller and the Solicitor General apparently advised this Court that he did not desire to file a brief stating the Comptroller's views. See Oct. T., 1958, No. 216, Brief in Opposition, p. 8.

The Comptroller has not argued that a court lacks power to pass on challenges to his statutory authority, although intervenor so argued in both courts below, basing its contention on decisions such as *Kennedy* v. *Gibson*, 8 Wall. 498 (1869), *Cases*

arate entity, and stated generally that "* * * what was done was within the authority conferred by existing statutes * * *". App., *infra*, p. 7a. The opinion stated that it was not within the court's "* * * province to pass on the desirability *vel non* of permitting a national bank to have an 'affiliate', as the appellant has here used the term * * *." App., *infra*, p. 7a. A petition for rehearing *in banc* was denied by the court below, Chief Judge Miller and Judge Bastian dissenting. App., *infra*, p. 11a.

REASONS FOR GRANTING THE WRIT

1. **Importance of the Question.** This case presents for decision the most important question of statutory construction to arise under the National Bank Act since this Court considered and decided *First National Bank* v. *Missouri*, 263 U.S. 640 (1924). The Comptroller of the Currency possesses only such authority to charter national banks or facilities as is conferred upon him by the National Bank Act. *Id.* at 656-657.

v. *Galt*, 94 U.S. 673 (1876) and *Adams* v. *Nagle*, 303 U.S. 532 (1938). In those cases, the Court refused to permit collateral attack in situations involving bank failures, the overriding consideration being the protection of creditors and depositors and the critical need for uninterrupted liquidation. 8 Wall. at 506; 303 U.S. at 540-541, 543; 94 U.S. at 679. Here, there clearly is jurisdiction to consider petitioner's charge that the Comptroller's proposed action is beyond his statutory powers. *Marbury* v. *Madison*, 1 Cranch 137, 165 (1803); *Harmon* v. *Brucker*, 355 U.S. 579, 581-582 (1958); *Board of Governors* v. *Agnew*, 329 U.S. 441 (1946).

In the district court, both the Comptroller and intervenor suggested that the completion of incorporation papers by intervenor on January 19, 1961 subsequent to the institution of suit and the administrative stay by the Comptroller and prior to the intervention served to rob petitioner of standing, with only the Attorney General empowered, by *quo warranto*, to challenge intervenor's status. Stenographic Transcript, pp. 7-8, 12, 74. Whatever intervenor's status, it could only commence the business of banking when it receives the Comptroller's certificate under 12 U.S.C. 27, *supra*, p. 2. It should be noted that, in *Wayne Oakland*, *supra*, the court of appeals rejected an argument by the Comptroller that his final certificate merely evidenced his prior approval.

2 One of the misapprehensions in the majority opinion below is that petitioner imported the term "affiliate" into this case. But see, *supra*, pp. 6, 7.

Two sections of the National Bank Act constitute the sole source of the Comptroller's power to create a national banking business or facility. 12 U.S.C. 27, *supra*, p. 2, authorizes the Comptroller to charter a new national bank if it appears on all the facts known to him, that the association "• • • is lawfully entitled to commence the business of banking. • • •". 12 U.S.C. 36 (c), *supra*, p. 2, authorizes him to approve the establishment of branches of national banks under carefully defined conditions. These sections, even if read separately, do not provide the requisite statutory authorization for the action of the Comptroller which the court below has approved. Read as part of an integrated statute, as they must be, these sections prohibit that action.

Petitioner's basic case presents a classic occasion for disregarding form—the "new" bank—and recognizing the substance of the transaction.[10] It was the duty of the Comptroller to recognize and reject the application as an attempted evasion of 12 U.S.C. 36 (c) (2) in the light of the clear language of the section and the forceful and affirmative Congressional policy embodied therein. See, *infra*, pp. 14-16.

The importance of the issue is magnified by the nature of the Comptroller's defense accepted by the court below. He has never stated, nor can he, that he viewed the proposed facility as a *bona fide* independent unit bank. Rather, he claimed, for the first time, an absolute statutory power knowingly to permit the establishment of "affiliates" and the right to exercise this power even though it results in the creation of a subordinate banking facility in circumstances where the establishment of a branch is clearly prohibited.

[10] The corporate privilege may never be invoked or urged for a purpose inconsistent with the policy of its creator. See, generally, 1 Fletcher, *Cyclopedia Corporations* (Permanent Edition), Section 45, 1960 Cum. Supp.; Stevens, *Corporations*, p. 96 (1949); Latin, *Corporations*, p. 75 (1959).

The reach of the Comptroller's claim of power is clear. After most elaborate consideration, Congress chose to put the national and state banking systems on a plane of absolute competitive equality in the matter of branch banking. Proposals that national banks be permitted to branch without reference to state law were rejected as destructive of the dual banking system. Where states permitted branching, national banks were not to be disadvantaged. Neither were they to have a competitive advantage. As the states opened up branching, national banks were accorded a precisely equal privilege, state by state. Since 1933, the administration of the delicate competitive relationship between national and state banks has been premised on this policy.

The Comptroller's position here, accepted by the court below, completely disregards this policy and frustrates the legislative objective. If that Congressional choice is now to be questioned,[11] the course to follow is to propose legislation, not to countenance the evasion of existing statutes by permitting devices such as that here involved. The power to choose is in Congress.

This case illustrates the point. Here, Haddonfield National has established branches wherever the statute permitted. Where it has done so, no state bank can come in. However, in Delaware Township, Haddonfield National

[11] On several recent occasions, the Comptroller has stated his dissatisfaction with the requirement that the privilege of national bank branching be measured by state law. He has described such laws as showing "* * * little regard for the public interest * * *, designed to protect selfish interests * * *" serving only "* * * the determined opposition of parochial interests". Excerpts from Comptroller's decision on merger of National Bank of Detroit and Bank of Livonia, reported in *The American Banker*, March 20, 1962. He went on to state: "For far too long the states have been in a position of impeding the National Banking System."

[12] The situation here parallels the 1920 situation in which the then Comptroller, impatient at his lack of authority to permit branching, sought to do so by the "outside agency" or "teller's window" device. The Court invalidated the device and Congress strongly condemned the Comptroller for acting without Congressional authority. *See infra*, pp. 13-14.

can come into territory already occupied by a state branch bank by means of the "affiliate" device. National banks thus gain an enormous competitive advantage. State banks will suffer or state legislatures be forced to adopt retaliatory policies, in an area where balanced and controlled competition has long been considered to be critical.

The need for review by this Court is clear. The question is important. The banking community is gravely concerned by the impact of the judgment below, which fixes the law, with virtually no consideration of the issue of statutory power, in the only jurisdiction in which the Comptroller is amenable to suit.

2. **The 1864 Statute.** The statutory provisions upon which both the court below and the Comptroller rely (12 U.S.C. 21-24, 26-27) derive from the National Bank Acts of 1863 and 1864, the statutes by which Congress re-established a national banking system.[13] The national bank which Congress thus empowered the Comptroller to create was to be an independent unit bank, locally complete and independent, conducting its usual business from within the four walls of its banking house. See 29 *Op. Atty. Gen.* 81 (1911). The rigorous nature of this concept as to the Comptroller's authority and a national bank's power was continuously emphasized. For example, this Court, in *Concord First National Bank* v. *Hawkins*, 174 U.S. 364 (1899), held that a national bank possessed neither the express nor necessarily implied power to acquire the shares of another national bank, stating (p. 369): "The smaller banks, in such a case, would be in fact, though not in form, branches of the large one."

The concept of a national bank as an independent unit

[13] The Act of June 3, 1864, 13 Stat. 99, was incorporated into the Revised Statutes and thence into the code. See 12 U.S.C. 38, note. Insofar as here material, these statutory provisions have not been changed since their original enactment in 1864.

bank was the basis of this Court's decision in *First National Bank v. Missouri*, 263 U.S. 640 (1924). The Comptroller had repeatedly urged Congress to permit him to authorize branches. *Infra*, pp. 14-15. Without authority, the Comptroller undertook to permit the establishment of outside "agencies" or "additional offices" to perform ministerial duties of a routine nature. The validity of such "outside offices" was the issue before the Court in the *First National Bank* case. The Solicitor General, in argument, conceded that, for over fifty years, it had been the continuous executive and Congressional view that the "usual business" of a national bank must be transacted "in a single and well-defined banking building." 263 U.S. at p. 648. But he urged that "modern banking practice" required changing the "narrow and literal" construction of the statutory "usual business" phrase, at least to the extent of validating these "outside offices." 263 U.S. at 649-650. This Court rejected the argument. After analyzing the statute, and noting with approval the consistent executive and Congressional construction of its provisions, the Court held that no power to establish outside offices could be implied as "* * * necessary to carry on the business of banking." 263 U.S. at 657-659.

The "outside office" or "teller's window" notion had, in fact, been used as a device, with the sanction of the Comptroller, to establish more than 439 branches between 1918 and 1926, a fact made known to Congress when it considered the McFadden legislation to permit limited branching.[14] 68 Cong. Rec. 3822. That action was condemned. It was noted that a national bank cannot do anything "* * * not specifically permitted in the national banking act * * *"

[14] The McFadden Act of 1927 authorized the establishment of "inside" branches by national banks within the limits of the city, town or village in which the bank was situated "* * * if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question * * *." 44 Stat. 1228, 12 U.S.C. 36(c)(1).

and that this device for evading the prohibition against branch banking had been "* * * foisted upon various communities by the lack of enforcement of the banking act by the Comptroller of the Currency. * * *" 68 Cong. Rec. 3822. The approval by the Comptroller of these "branch offices" was described as "an "* * * illustration of bureaucracy legislating instead of Congress legislating." 68 Cong. Rec. 3823.

The basic concept of the national banking system—a system of unit independent banks—was adhered to and reaffirmed by Congress in the course of considering the branch banking legislation of 1927 and 1933. Carefully defined branching power was added to equalize the competitive position of national banks with state banks. Beyond this, there was no departure from the strong Congressional feeling that the system of unit independent banks was the "distinctive achievement" of the banking system of the United States and must be maintained. 68 Cong. Rec. 3826.[15]

3. **The 1933 Branching Legislation.** The enactment in 1933 of the branch banking provisions of the Glass-Steagall Act (12 U.S.C. 36(c)(2)) was preceded by many years of concern on the part of the Comptroller of the Currency over his lack of authority to put national banks on a competitive parity with state banks by the authorization of branches.[16]

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[15] See 68 Cong. Rec. 2166, 2169, 2171, 2172, 2173, 2174, 2175, 2176, 2178, 2180, 2182, 2184, 2188, 3652. See also 37 Op. Atty. Gen., *supra*, at p. 329; S. Rep. 584, 72d Cong., 1st Sess. (Minority Views), pp. 1-4; 75 Cong. Rec. 1416, 2141, 9975, 9980.

[16] In the first two decades of this century, state banks engaged extensively in branch banking in those states where branching was permitted. Board of Governors, Federal Reserve System, *Banking Studies* (1941 Ed.), p. 118. State law with regard to branch banking has developed steadily since the 1920's. As of 1927, only 8 states permitted state-wide branching and 9 permitted city and county branching. As of today 17 states permit state-wide branching, 19 permit branching within limited areas, 12 prohibit branching and 2 have no legislation on the subject. Thus, as the states have opened up branch banking, the privilege of branching has become available to national banks pursuant to 12 U.S.C. 36(c).

See, *e.g.*, Annual Report of Comptroller of the Currency, 1895; *ibid* 1896, pp. 103-105; *ibid* 1902, pp. 45-57. Beginning in 1915, the Comptroller recommended annually that he be empowered to authorize branching. See, *e.g.*, Annual Report of Comptroller, 1915, pp. 33-34; *ibid*, 1923, pp. 2-17; *ibid*, 1924, p. 5; *ibid*, 1929, p. 5. The position of the Comptroller's office by 1930 was that outside branching should be permitted on a "trade area" basis, not measured by state branching laws. *Hearing Before the Committee on Banking and Currency of the House of Representatives on Branch, Chain and Group Banking* (1930), 71st Cong., 2nd Sess., Vol. 1, pp. 6, 9, 15-18, 23, 27, 66-67, see also, Annual Report of Comptroller, 1931, p. 1.

By 1932, the economic realities of the banking crisis tempered the consistent refusal of Congress to permit national banks to branch. The reports accompanying the Glass-Steagall Bill recognized that the "* * * banking system is going through a period of great change * * *" and that, therefore, "* * * provision for branch banking powers under carefully qualified conditions with a view to making a larger experiment with branch banking is deemed essential * * *" S. Rep. 77, 73d Cong., 1st Sess., p. 11. The "carefully qualified conditions", embodied in the language of the statute, reflect a basic and sharply debated choice by Congress. S. 4412, as originally introduced by Senator Glass (reported out on May 6, 1932, 75 Cong. Rec. 9711) would have authorized state-wide branching without regard to state law. This proposal was seen as threatening the existence of the dual banking system and was bitterly opposed. S. Rep. 584, 72d Cong., 1st Sess., Part II (minority views), pp. 1, 4-5 (1932); 75 Cong. Rec. 9890, 13002; 76 Cong. Rec. 4449, 1997, 2079, 2080, 2090, 2205, 2206. Accordingly, the bill passed only the Senate after being amended to embody a forceful and affirmative Congres-

[12] See, *infra*, pp. 16-18.

sional policy of establishment of precise competitive equality between the national and state banking systems—national banks were to be permitted to branch only in those states where state banks were given this privilege and under precisely the same terms and conditions. S. 4412, as thus amended, was reintroduced in the 73d Congress, and enacted with the language embodying the policy of precise equality further strengthened. 77 Cong. Rec. 3726; S. Rep. 77, *supra*, p. 11. And see 37 Op. Atty. Gen. 325 (1933). As enacted, the Comptroller is authorized to permit outside branches, only where such branches would be permitted to a state bank "* * * by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition * * *". 12 U.S.C. 36 (c)(2).

4. **"Affiliate" Banks.** The Comptroller's argument that he has absolute statutory power knowingly to authorize an "affiliate" under 12 U.S.C. 27, implicitly accepted by the court below, is based on the existence of forms of multiple banking known as "chain" or "group" banking.[18] Chain and group banking exist but developed, not as the result of

[18] In chain banking, each bank in the chain is a separate corporate entity with its own directors "* * * operated quite independently of all the others in the chain * * *" but centrally owned. Cartinhour, *Branch, Group and Chain Banking* (1931), p. 59. "* * * In a typical chain system, usually an individual or a group of individuals owns and controls two or more unit banks * * *." Chapman and Westerfield, *Branch Banking* (1942), p. 319. The descriptive words "chain" or "group" serve to indicate whether ownership is in individuals or corporations.

"Affiliate" is not a word of art. Rather, the term is descriptive of a variety of relationships. For example, "affiliation" may exist between chain banks, group banks, national and state banks, banks and non-banking enterprises. See, *e.g.*, 12 U.S.C. 221a. The term acquires content from the context in which it is used. Here, "affiliate" is used to describe the relationship to Haddonfield National of a proposed subordinate facility—organized in corporate form because the establishment of a branch was prohibited and which would otherwise never come into existence—to be operated under common management and control in territory already served by Haddonfield.

It has been suggested that the term "affiliate" comes into use in banking matters whenever the keynote is evasion. 74 Cong. Rec. 9904.

official authorization by banking officials such as the Comptroller, but as the result of uncontrolled private activity. Congress has viewed resort to these forms of banking as an evil and has sought, to the extent deemed possible, to impose measures of control. These control measures neither create nor recognize in the Comptroller the power he here claims.

The law of most states in the 1920's, like the National Bank Act, authorized only the creation of unit banks. *Branch, Group and Chain Banking*, 48 Harv. L.R. 659, 660-661. The states also forbade the direct acquisition of the stock of one bank by another. 48 Harv. L.R. at p. 663. Cf. *Concord First National Bank v. Hawkins*, *supra*. At the same time, there was a powerful trend toward concentration of control in banking, as in other fields.[18a]

A way to realize this drive was found in the fact that there was no control on the right to form a chain through stock purchase or acquisition, or some other form of private activity. 48 Harv. L. R. at 663; Hearings, *supra*, Vol. I, pp. 221, 223. The chains thus formed could be interstate or intrastate in nature, combining national and state banks under common control, and embracing non-banking enterprises being insulated from scrutiny by the "almost insurmountable difficulty" of examining the chain as a whole. 48 Harv. L. R. at 663; Chapman, *Concentration of Banking* (1934), p. 741; Westerfield, *The Banking Act of 1933*, 41 J. Pol. Econ. 721, 744 (1933); Hearings, *supra*, Vol. 1, pp. 6, 27, 32, 221, 243; 31 Colum. L. R. at pp. 976-977.

As the banking crisis developed, Congress gave close study to this whole development, conducting the extensive

[18a] *Hearing Before the Committee on Banking and Currency of the House of Representatives on Branch, Chain and Group Banking* (1930), 71st Cong. 2d Sess., Vol. 1, pp. 22-23; Vol. 2, part 2, p. 1537; 48 Harv. L.R. at 663; *Branch Banks as Separate Entities*, 31 Colum. L. Rev. 975, 976-977 (1931).

hearings referred to above. The then Comptroller of the Currency testified that the federal government could not regulate chain bank systems directly and that states were unable to cope with the problem—a situation he described as "unwholesome". *Hearings, supra*, Vol. 1, pp. 6, 15-18, 27, 66-69, 221, 223. The Comptroller's testimony assumed that chain or group banking came into existence by uncontrolled acquisition or investment, not as the result of authorization by federal or state banking officials, and that he had no jurisdiction over chain banks. *Hearings, supra*, Vol. 1, pp. 6, 26-27, 32-33, 68-69, 221, 223.

The Glass-Steagall legislation—which provided for branch banking, *supra*, pp. 14-16—dealt separately with the evils in the banking system created by the growth of chain and affiliate systems. The whole growth of "bank affiliates" was described as "• • • situation never contemplated by the national banking act • • •." S. Rep. 584, 72d Cong., 1st Sess., p. 9; S. Rep. 77, 73d Cong., 1st Sess., p. 10. The report stated that the power to abolish "affiliates" was doubtful. S. Rep. 584, *supra*, p. 10. The report pointed out that group banking was similar to the "affiliate" system, stressing that the "• • • evils of indirect control are similar in the two cases • • •. The difficulty of eliminating or abolishing them in any effective way is similar to the difficulty of eliminating or abolishing the affiliates of city banks. • • •." S. Rep. 584, *supra*, p. 10. The report then states that a major objective of the legislation was to "• • • separate as far as possible national and member banks from affiliates of all kinds." S. Rep. 584, *supra*, p. 10.

Congress, accordingly in the 1933 legislation went as far as it deemed legally and practically possible. Various controls were imposed by way of conditions on federal reserve membership and F.D.C. coverage. 12 U.S.C. 161, 371(c).

377, 481.[19] The legislation thus enacted was designed to control an existing evil and in no way supports a claim by the Comptroller of Congressional approval, or recognition in him, of a statutory power to create affiliated banks.[20]

[19] By the time of the passage of The Bank Holding Company Act of 1956, the control measures enacted in 1933 were viewed as "entirely inadequate" to deal with the "unrestricted ability" of a bank holding company to add to the number of its units and to combine under single control both banking and non-banking enterprises. S. Rep. 1095, 84 Cong. 2d Sess., U.S. 1956 Code Congressional and Administrative Service, p. 2483. The 1956 legislation deals again, with the *acquisition* of, or *merger* or *consolidation* with, existing banks. 12 U.S.C. 1841(a) (c); 12 U.S.C. 1842. The legislation has nothing to do with the power of the Comptroller to create national banking facilities.

Some reference has been made in this case to the rejection by Congress, in connection with the 1956 legislation, of a proposal that holding company control be measured by state laws on branch banking. In rejecting this proposal, Governor Robertson of the Federal Reserve Board stressed that uniformity was the overriding consideration in determining Congressional choice of a method of implementing federal policy against concentration of control. *Hearings Before a Subcommittee of the Senate Committee on Banking and Currency*, on S. 880, S. 2380 and H.R. 6227, 84th Cong., 1st Sess., p. 48. The inapplicability of state branching laws for achieving uniform federal control is obvious. The purpose of Congress in the 1933 branching legislation, was precisely the opposite. There Congress deliberately equated the privilege of national bank branching to state-branch banking, so as to ensure equality of competition on a state by state basis, with the states having the lead in widening the area of branching. *Supra*, pp. 15-16.

[20] The same conclusion is dictated by Congressional condemnation of the use of affiliate banks for the evasion of branch banking laws. Senator Glass, the prime sponsor of the legislation, stated that "* * * affiliates and the holding companies are acquiring long chains of banks * * * they are buying up banks * * *." 75 Cong. Rec. 9892. Senator Fletcher, another supporter, pointed out that national banks were evading the statutory restrictions on branching by organizing facilities and "those affiliates are doing exactly what a branch bank would do." 75 Cong. Rec. 9892. In response to Senator Fletcher, Senator Glass stated that a purpose of the legislation was to "* * * break up chain banking, which is an irresponsible species of banking and substitute for it branch banking, which is an entirely responsible species of banking." 75 Cong. Rec. 9893.

CONCLUSION.

The Comptroller of the Currency possesses only that authority to charter national banks or branches which has been conferred upon him by Congress. Under the 1864 provisions of the National Act, that power is limited to the establishment of *bona fide* independent unit banks. To this basic power, Congress has added the authority to approve the establishment of branch facilities under precisely defined conditions, not satisfied here. The effect of the decision below, sustaining the Comptroller's action in approving the application to establish an "affiliate", confers upon him an authority which Congress has not seen fit to grant and which must inevitably result in damage to the administration of the dual banking system.

Respectfully submitted,
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March 31, 1962

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16575

CAMDEN TRUST COMPANY, APPELLANT,

v.

RAY M. GIDNEY, Comptroller of the Currency, et al.,
APPELLEES.

Appeal from the United States District Court
for the District of Columbia

Decided January 18, 1962

Mr. Samuel D. Slade for appellant. *Mr. Paul A. Sweeney* also entered an appearance for appellant.

Mr. John G. Laughlin, Jr., Attorney, Department of Justice, with whom *Assistant Attorney General William H. Orrick, Jr.*, and *Mr. David C. Acheson*, United States Attorney, were on the brief, for appellee Gidney.

Mr. Martin P. Snyder, of the bar of the Supreme Court of Pennsylvania, *pro hac vice*, by special leave of court, with whom *Mr. J. David Mann, Jr.*, was on the brief, for appellee Delaware Valley National Bank of Delaware Township. *Mr. J. Louis Monarch* also entered an appearance for appellee Delaware Valley National Bank of Delaware Township.

Mr. Lawrence J. Latto filed a brief on behalf of the State of New Jersey, as *amicus curiae*, urging reversal.

Mr. James F. Bell filed a brief on behalf of National Association of Supervisors of State Banks, as *amicus curiae*, urging reversal.

Before WASHINGTON, DANAHER and BASTIAN, *Circuit Judges*.

DANAHER, *Circuit Judge*: Appellant, Camden Trust Company, is a banking corporation organized under the law of New Jersey with its principal office in Camden and, since 1953, with a branch at Erlton in Delaware Township, New Jersey. Seeking declaratory and injunctive relief, appellant challenged the Comptroller's authority under pertinent provisions of the National Bank Act,[1] to issue a certificate of authority which would permit the intervenor, Delaware National Bank of Delaware Township, to commence the business of banking. The District Court granted summary judgment to the Comptroller and the intervenor and dismissed the complaint.[2]

On this appeal, appellant argues that under New Jersey's Banking Act of 1948,[3] no other state bank could establish a branch in Delaware Township. Accordingly it is urged that no national bank can establish a *branch*[4] at Elfisburg Circle in Delaware Township, only one mile from appel-

[1] 12 U.S.C. §§ 21-27 (1958), as amended, 12 U.S.C. §§ 24a, 24, 26 (Supp. II, 1960). Section 27 provides with respect to a "new" duly qualified banking association, that the Comptroller "shall" grant a certificate of authority, but "may withhold" a certificate "whenever he has reason to suppose that the shareholders have formed the same for any other than the legitimate objects contemplated by this Chapter."

[2] The Comptroller, pendente lite, agreed to an administrative stay of issuance of a certificate of authority to the intervenor.

[3] N.J.S.A. 17:9A-1(2) so defines "banking institution" as to include a "national banking association," and 17:9A-19 provides in pertinent part:

"B. No bank or savings bank shall establish or maintain a branch office which is located outside the municipality in which it maintains its principal office; except that a bank or savings bank may establish and maintain a branch office or offices anywhere in the same county as that in which it maintains its principal office.

* * * * * *

"(3) When each proposed branch will be established in a municipality in which no banking institution has its principal office or a branch office."

[4] Resolution of our issue turns on whether or not intervenor is a "branch." Of course, "there is no discretion in Comptroller to approve the establishment of a branch office at a location prohibited by law." Commercial State Bank of Roseville v. Gidney, 174 F. Supp. 770, 778 (D.D.C. 1959), *aff'd*, 108 U.S.App.D.C. 37, 278 F.2d 871 (1960). Appellant to fortify its contention points to 12 U.S.C. § 36 (1958) which reads in pertinent part:

[illegible]'s branch at Erlton. The Haddonfield National Bank, located in the adjacent Borough of Haddonfield, had sought in 1960 to locate its main office in Delaware Township while retaining as a branch its Haddonfield office only two miles from Ellisburg Circle. The Comptroller denied that application, correctly we think, for clearly the application related to a *branch*, not a "new" bank.

Shortly thereafter, eight of Haddonfield National's nine directors, later joined by the tenth, as individuals signed and filed an application for the incorporation of a new national bank at the Ellisburg Circle location. Appellant filed objections to the application and by appearance before the Comptroller vigorously protested. The Comptroller [illegible] Camden filed this action. Its complaint in the District Court alleged that the application of the Haddonfield directors was "on its face a pretext and a stratagem to circumvent the provisions and purposes of the National Bank Act by attempting to establish [illegible] Delaware Township a banking facility that will for all practical purposes constitute a branch facility of the Haddonfield National Bank." Issue of a Certificate of Authority to open a bank, it contends, is contrary to law, because the Comptroller's authority to approve ceases upon his disapproval.

Whatever weight is to be given to the appellant's legal argument, it is difficult to think of the Haddonfield [illegible]

[illegible] National banking [illegible] of the currency, establish and operate [illegible] city, town or village in which said [illegible] operation are at the time expressly authorized to [illegible] State in question, and [illegible] is situated, if such establishment and operation are at the time [illegible] Banks by the statute law of the [illegible] such authority affirmatively and not merely by implication or silence, and subject to the restrictions as to location imposed by the law of the State on State banks.

[illegible] National Bank of Detroit v. Wayne-Oakland Bank, [illegible] *denied*, 358 U. S. 830 (1958); Michigan National Bank-Lenawee, Mich. v. Andrews, 99 U. S. App. D. C. 134, 237 F. 2d 962, *cert. denied*, 352 U. S. 837 (1956); First Natl. Bank v. Missouri, 263 U. S. 640, 658, 659 (1924); [illegible] Franklin Nat. Bank v. New York, 347 U. S. 373, 378 n. 7 (1954).

tors' action as a "subterfuge,"[6] at least in an invidious sense. On the contrary, the preliminary proceedings seem to have been open and notorious. Perhaps on that account the "subterfuge" was alleged to be "manifest." The president of the Haddonfield National Bank on its letterhead notified all of its shareholders of the plan and the objective which the directors sought.[7] Appellant protested orally

[6] Subterfuge. "A device, plan, or the like, to which one resorts for escape of concealment; an artifice employed to escape censure or the force of an argument, or to justify opinions or conduct; an evasion." MERRIAM-WEBSTER NEW INTERNATIONAL DICTIONARY (2d ed. 1959). Cf. Los Angeles Fisheries v. Crook, 47 F.2d 1031, 1035 (9 Cir. 1931).

[7] As an exhibit to appellant's complaint, the following letter, on the Bank's letterhead, was reproduced:

December 8, 1960

To the Shareholders of Haddonfield National Bank

On many occasions your Board of Directors and Officers have been invited by the residents and businessmen of Delaware Township to extend banking facilities to that area by the establishment of a branch office in that fast growing municipality. Under the New Jersey banking law, to which we are subject with regard to branches, it is not permissible for a bank, other than in its home community, to establish a branch office in a municipality where a banking office already exists. It is possible, however, to apply for a charter to start a new bank where the need, both present and future, would appear to exist. In line with that reasoning your Board of Directors as individuals, applied and have received from the Comptroller of the Currency, preliminary approval to establish a new bank to be known as the DELAWARE VALLEY NATIONAL BANK OF DELAWARE TOWNSHIP, to be located in the Barclay Farm area.

The new bank proposes to issue 22,500 shares ($10 par) stock at $23.00 per share and the proceeds from the stock sale will be divided as follows:

Capital	$225,000.00
Surplus	225,000.00
Undivided Profits	67,500.00

It is expected that the DELAWARE VALLEY NATIONAL BANK will be an affiliate of the Haddonfield National Bank and that its affairs will be conducted by the same management and under the same policies as the Haddonfield National Bank.

The Board of Directors of the Haddonfield National Bank feels this is a very worthwhile undertaking and as shareholders you are invited to subscribe for shares in the new bank. Will you please indicate on the stub, which appears at the bottom of this letter, *whether or not* you are interested in purchasing shares in the new bank and to what extent. We would appreciate hearing from you within the next 10 days and a self-addressed postage paid envelope is enclosed for your convenience when replying.

Sincerely,

H. Moeller
President

and in writing to the Comptroller. The latter and the New Jersey Bank Commissioner[9] corresponded concerning the project. It fairly may be said that we perceive nothing arcane or wrongfully covert in the effort. The respectively zealous competitors really are at issue, we feel sure, solely as to whether or not the Comptroller in the circumstances shown is to be precluded by law from issuing a certificate of authority to the intervenor.

Thus viewed in its fundamentals, the case would seem to turn, not on the Comptroller's power but on its exercise. It is not claimed that the Comptroller may not charter a "new" bank. Rather it is urged, he must permit the creation only of a "bona fide independent national bank doing business within its four walls." For that narrow proposition appellant points to 12 U. S. C. § 36(c).[10] We read the section as saying that the Comptroller, affirmatively is empowered to authorize a national banking association to establish and operate new branches at, when and where state law permits state banks to do so.[11] The amendment subsequent to *First National Bank* v. *Missouri*, is clear on its face and says, without ambiguity, exactly what it means. Beyond peradventure, Congress even defined the term "branch."[12]

Appellant next would say, the intervenor will be "an affiliate" of the Haddonfield National Bank, referring to its exhibit, set forth in full in note 7. We read that language as an assurance to shareholders of Haddonfield that the trusted management of Haddonfield and the policies pursued in the past may justify investment in the shares of the new bank. The directors of Haddonfield

[9] The State of New Jersey, taking a position similar to that of the appellant, has been allowed to file a brief as amicus curiae. A like privilege was accorded to and accepted by the National Association of Supervisors of State Banks.

[10] *Supra* note 4, and of course to New Jersey law, *supra* note 5.

[11] Congress in § 36(c) did no more than "remedy the omission." See First Nat'l Bank v. Missouri, *supra* note 5, 263 U. S. at 659.

[12] 12 U. S. C. § 36(f) (1958). Even if it properly may be said that intervenor is an "affiliate" of Haddonfield, Congress has recognized a distinction between a "branch" and an "affiliate." See 12 U. S. C. §§ 221a, 377, 481 (1958); 12 U. S. C. §§ 161(c), 371c (Supp. II, 1960).

who as individuals were committing themselves and their capital sought information as to "whether or not" existing shareholders "are interested in purchasing shares in the new bank and to what extent." They were to be required to raise $517,500 "which would result in a legal loan limit of $50,000—the same as that of Camden Trust Company's branch at Erlton," the appellant tells us in its brief. We see nothing sinister in a banker's prudent inquiry as to just where the promoters were to stand.

There is nothing in the record to show that the shareholders formed the association "for any other than the legitimate objects" contemplated by the Act. The Haddonfield National Bank has not been shown to own the intervenor even if some of the stockholders and directors of the former should own some of the shares of the latter. The intervenor clearly is not a branch of Haddonfield but is a completely separate entity with certain distinguishing characteristics sufficiently so set up in the Government's brief as to justify our quoting verbatim:

> The capital structure of Delaware Valley is totally independent of that of Haddonfield National; the stock of Delaware Valley has been subscribed to and "paid in" as required by 12 U.S.C. 53; Delaware Valley stockholders are subjected to the individual liability described in 12 U.S.C. 63 [sic; repealed, 73 Stat. 457 (1959); see 12 U.S.C. § 64a], unrelated to their possible liability as shareholders in Haddonfield National; the Comptroller has assigned a name to Delaware Valley that is not susceptible of confusion with Haddonfield National; Delaware Valley will be located approximately two miles from the main office of Haddonfield National . . . the general business of banking to be conducted by Delaware Valley will "be transacted in the place specified in its organization certificate" (12 U.S.C. 81); deposits with Delaware Valley will be its liability not that of Haddonfield National; loan limitations on Delaware Valley will be those applicable to an independent bank, based on its own capital structure and totally independent of loan limitations applicable to Haddonfield National (12 U.S.C. 84); the limits of indebtedness which may be incurred by Delaware Valley will be as prescribed in 12 U.S.C.

82 and independent of similar limitations on Haddonfield National; the directors of Delaware Valley have been elected by its shareholders (12 U.S.C. 71), meet the citizenship, residence, and stock-ownership requirements specified in 12 U.S.C. 72, and: "If the directors • • • shall knowingly violate, or knowingly permit any of [the] officers, agents, or servants • • • to violate any of the provisions of [12 U.S.C. 21-214c], all the rights, privileges, and franchises of the association shall be thereby forfeited. • • •" 12 U.S.C. 93.

It is not within our province to pass upon the desirability *vel non* of permitting a national bank to have an "affiliate," as the appellant has here used the term. If such an affiliate is to be denied status, Congress must clearly say so. It is sufficient for our disposition of the present controversy to observe that what was done was within the authority conferred by existing statutes. Convinced, as we are, that 12 U.S.C. § 36 has no applicability to the situation disclosed on this record, we deem it unnecessary to consider other contentions urged upon us.[12] Accordingly, the judgment of the District Court is

Affirmed.

BASTIAN, *Circuit Judge*, dissenting: Congress, in 12 U.S.C. § 36(c)(2), provided:

> "(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: • • • (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks."

Under the banking laws of the State of New Jersey, a new branch bank may not be located in Delaware Town-

[12] We therefore do not discuss the District Court's conclusion that the appellant is without standing.

ship because there is a pre-existing banking office in that municipality. This is by virtue of the Banking Act of 1948 of the State of New Jersey (N.J.S.A. 17:9A-19), which provides in part as follows:

> "B. No bank or savings bank shall establish or maintain a branch office which is located outside the municipality in which it maintains its principal office; except that a bank or savings bank may establish and maintain a branch office or offices anywhere in the same county as that in which it maintains its principal office."

I think appellant is correct in its argument that:

> "The facts plainly show that the transaction here involved, in form an application for a 'new' bank charter, is, in substance a subterfuge to obtain a forbidden branch facility. These facts, fully known to the Comptroller, imposed a statutory duty on him to reject the application. This duty would follow the application of the familiar general principle that form will be disregarded whenever necessary to prevent evasion of the clear purpose of a statute. But the duty is made clear beyond question here by consideration of those statutory provisions from which alone the Comptroller derives his authority, the consistent interpretation of those provisions, and the strong and affirmative Congressional policy as to the nature of the Comptroller's authority.
>
> "A. The 1933 branch bank legislation was preceded by over a quarter of a century of concern by the Comptroller of the Currency as to his lack of authority to authorize branching by national banks and his repeated recommendations to Congress that he be given such authority. The Congressional history of the 1933 legislation makes plain that the Comptroller was only empowered to authorize national banks to establish branches on the basis of precise competitive equality with state banks. Accordingly, national banks could establish outside branches only in states where such branches were '* * * authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition * * *.' The debates which led to this

strictly circumscribed branching authority are outspoken in their condemnation of the use of chain or 'affiliate' banks as devices for evading branch banking restrictions or prohibitions.

"Thus, the only power added to the Comptroller's original authority to charter *bona fide* unit independent banks was the authority to permit branching as permitted by the statute law of the state in question, on a basis of precise equality with state banking systems."

While my colleagues take exception to appellant's use of the word "subterfuge," I think that one of the definitions quoted by them, namely "an evasion," covers the action of appellee like a glove.

The State of New Jersey, which has filed an *amicus* brief, contends, correctly I think, that "if an application for a new State banking charter were made under the same circumstances, it would be regarded in its substantive character as a branch application and rejected under the statute governing branch applications"; and that "[o]n the facts present in this case, the Delaware National Bank of Delaware Township should be held to be tantamount to a branch office of the Haddonfield National Bank, thereby bringing it within the scope and prohibition of 12 U.S.C. 36 (C) and Section 19 of the New Jersey Banking Act of 1948 (N.J.S.A. 17:9A-19)."

If substance rather than form is to prevail, the judgment of the District Court should be reversed.

JUDGMENT

THIS CAUSE came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION WHEREOF It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, affirmed.

It is further ORDERED by the Court that appelee Delaware Valley National Bank of Delaware Township recover from appellant its taxable costs on this appeal and have execution therefor.

PER CIRCUIT JUDGE DANAHER.

Dated: January 18, 1962

Separate dissenting opinion by Circuit Judge Bastian.

ORDER

There not being a majority of the circuit judges of this court in favor of a rehearing of the above-entitled case by the court *en banc*, the petition for rehearing *en banc* is hereby denied.

For the Court:
Chief Judge.

Dated: February 20, 1962

CHIEF JUDGE MILLER and CIRCUIT JUDGE BASTIAN would grant the petition for rehearing *en banc*.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 831

CAMDEN TRUST COMPANY,
Petitioner,

v.

RAY M. GIDNEY, COMPTROLLER OF THE CURRENCY,

and

DELAWARE VALLEY NATIONAL BANK OF DELAWARE TOWNSHIP.

BRIEF FOR THE STATE OF NEW JERSEY, *AMICUS CURIAE*, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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IN THE

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BRIEF FOR THE STATE OF NEW JERSEY, *AMICUS CURIAE*, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

This brief *amicus curiae* by the State of New Jersey is filed in accordance with Rule 42(4) of the Rules of this Court.

Interest of the State of New Jersey

This case presents the question whether the grant of a national bank charter under the circumstances found in the record does not, in substance and as a matter of law, violate the branch banking provisions of the National Bank Act, 12 U.S.C. 36(c)(2). Such provisions prohibit a national bank from establishing a branch in a municipality

where a state bank would be so prohibited under an applicable state statute—here, Section 19 of the New Jersey Banking Act of 1948, N.J.S.A. 17:9A-19. This case involves an attempt to circumvent the effect of the New Jersey banking statute and the provisions of the National Bank Act. The State of New Jersey, as the state most interested, concurs in petitioner's contention that the application to establish the Delaware Valley National Bank of Delaware Township, intervenor-respondent, should be held to be tantamount to an application for a prohibited branch of the existing Haddonfield National Bank, within the scope and meaning of 12 U.S.C. 36(c)(2) and Section 19 of the New Jersey Banking Act of 1948.

Argument

Section 19 of the New Jersey Banking Act of 1948, N.J.S.A. 17:9A-19, provides, *inter alia*, that a bank may not establish a branch office except in a municipality in which no banking institution has its principal office or a branch office. Under 12 U.S.C. 36(c)(2), Congress requires that state law governing the establishment of branch banks must be followed in establishing national bank branches. Thus, because petitioner has operated a branch office in Delaware Township, New Jersey since 1953, a national or another state bank not having its principal office in Delaware Township could not and cannot open a branch office there.

In an effort to establish a banking facility in Delaware Township, Haddonfield National Bank, having its principal office in Haddonfield, New Jersey, sought unsuccessfully to obtain the Comptroller's approval for it to move its main office into Delaware Township and retain its Haddonfield office as a branch. Shortly after the rejection of the aforesaid plan, the directors of Haddonfield National

Bank, admitting that an outright branch office of Haddonfield National could not be established in Delaware Township, openly joined as individuals in an application for grant of a new national bank charter for intervenor-respondent, to be located in Delaware Township at the same location to which Haddonfield National would have moved its main office, and to be an affiliate of Haddonfield National and operated under the same management and policies. The shareholders of Haddonfield National were invited to subscribe for shares in the new bank. It is obvious that, regardless of form, the substantive character of the foregoing application is an application for the establishment of a branch in a municipality where a branch is not permitted under New Jersey law.

The decisions of the District Court and the Court of Appeals would affirm the Comptroller's approval of intervenor-respondent's application, and thereby sanction the device employed. However, if the Comptroller's power to grant new banking charters can be utilized to create a facility affiliated with, and operated under the same policies and management as a national bank, without regard to the branch office restrictions of 12 U.S.C. 36(c)(2), grave damage will be done to existing competitive balances in the nation's dual banking system, and to federal-state relationship in this area. The door will be open for all national banks to evade state branching restrictions by the device of establishing an affiliate.

In a dual banking system, it has long been recognized that, while competition between banking institutions is desirable, subject to conformity with prudent practices and regulatory controls, unequal competition between the state and national banks with respect to the size and number of banking offices can result only in jeopardizing the financial security of the public at large. Therefore, although the National Bank Act is basically a *unit* banking statute, a limited branch office exception to this unit bank rule

was created by Congress in 1933 for the purpose of affording unit national banks competitive equality with those state banks which are specifically permitted by state statute to establish branches.

The creation of a new national bank in the circumstances here present perverts the intent and purpose of Congress. If the courts cannot or will not require the Comptroller to examine the motivation and facts surrounding an application for a charter of an affiliate of a national bank, in order to determine whether the new bank will be in law and practical effect a branch prohibited under 12 U.S.C. 36(c)(2), the result will be to emasculate a key statutory protection, as well as destroying true equality between the state and federal banking systems. Certainly no geographical restrictions on location of national bank branches will thereafter be meaningful and national banks will be able to do indirectly what they could not do directly.

Too, this weakening of the statutory policy, directive and control otherwise imposed by Congress upon the powers of the Comptroller by virtue of 12 U.S.C. 36(c) is cause for concern when considered against the background of the Comptroller's asserted immunity to judicial challenge on grounds other than illegality. (See, *Community National Bank of Pontiac v. Gidney*, 192 F. Supp. 514 (D. C. Mich., 1961).)

Apart from the sharp contrast of New Jersey practice in this respect,* which further accentuates for State banks

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* Every decision of the New Jersey Commission of Banking and Insurance granting branch or new charter applications is reviewable on appeal taken by an interested party, with broad standing afforded because of the public interest involved. N.J. R.R. 4:88-8; *Elizabeth Federal Savings & Loan Assn. v. Howell*, 24 N. J. 488, 132 A. 2d 779 (1957) and 30 N. J. 190, 152 A. 2d 113 (1959). This right is frequently exercised by competing national banks. See *e.g., Application of Hazard Savings Institution*, 32 N. J. 29, 159 A. 2d 113 (1960).

the competitive inequality previously mentioned, we point out that the decisions below threaten to replace a plain statutory policy and mandate with the unfettered and unreviewable discretion of the Comptroller. Whether viewed by lawyer or banker, this is a poor exchange.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

April 9, 1962.

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State of New Jersey.

DAVID LANDAU,
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Of Counsel.

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IN THE

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CAMDEN TRUST COMPANY,
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and
Delaware Valley National Bank of
Delaware Township

On Petition For a Writ of Certiorari To The United States Court of Appeals For The District of Columbia Circuit

BRIEF OF AMICUS CURIAE, THE NATIONAL ASSOCIATION OF SUPERVISORS OF STATE BANKS, IN SUPPORT OF PETITION

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In The

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BRIEF OF AMICUS CURIAE, THE NATIONAL ASSOCIATION OF SUPERVISORS OF STATE BANKS, IN SUPPORT OF PETITION

This brief is filed pursuant to Rule 42 of this Court with the consent of all parties.

INTEREST OF AMICUS CURIAE

The National Association of Supervisors of State Banks (hereinafter called the "Supervisors") was founded in

1902 and has 52 members. It is composed of the officials of State governments responsible for the supervision of State-chartered banking institutions in every State in the Union, and of such officials in the Commonwealth of Puerto Rico and in the Virgin Islands. The 9,446 State banks under their supervision, together with the 4,513 National banks chartered under the National Bank Act of 1864, Rev. Stat. para. 5133 *et seq.* 12 U.S.C. 21 *et seq.*, subject to the supervision of the Comptroller of the Currency, comprise the "dual banking system."

The Supervisors have a keen interest in this case. As indicated by Appendix A to this brief, eighteen States do not authorize the establishment of branches by State banks, while fifteen others permit branches on a limited basis, usually only in municipalities where no banking facility already exists. State banks in these thirty three States could not long survive in competition with National banks, if such National Banks held more liberal branching authority than such State banks, just as National banks could not survive in States where State banks held more liberal branching authority. Congress has recognized this fact and in the National Bank Act, 44 Stat. 1228, 12 U.S.C. 36(c), established State law as the standard by which branches of National banks may be established. Accordingly, both State and National banks in each State operate today under the same standard for the establishment of branches, that of the branch laws of the respective States.

The decision below sustains an approval by the Comptroller of an application by the directors of an existing National bank to form a new bank in a State under circumstances where, under State law, such an application by the directors of a similarly situated State bank would be rejected as a forbidden branch. This decision is a matter of deep concern to the Supervisors for it appears to countenance a manifest evasion of the competitive equality

between State and National banks in the matter of branching which Congress sought to establish in the National Bank Act, and upon which depends the continued vitality of the State Banking System.

REASONS FOR GRANTING THE WRIT

1. This is a case of first impression involving an important question of Federal law affecting the dual banking system.

Congressional policy on branching. One of the most controversial questions to arise in the banking industry has been that of the establishment of branch banks. Between 1864 and 1927 the National Bank Act did not provide for the establishment of branches by National banks, a restriction which was rigidly enforced. *First National Bank* v. *Mo.*, 263 U.S. 640 (1924). There was mounting pressure for the authority to establish such branches, however, both by advocates of branch banking and by the Comptroller of the Currency who felt that the very existence of the National banking system was threatened by the competitive advantage held by State banks authorized by State law to establish branches.[1]

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[1] E.g., the 1922 Annual Report of the Comptroller of the Currency stated at p. 4: ". . . we are in grave danger of losing our larger national banks in states where more liberal charters are granted to state banks unless we extend to national banks the privilege and facilities in carrying on their business that are accorded to state banks." The 1923 Report (pp. 4-17) contained an exhaustive coverage of this matter and flatly stated at p. 6: "If, however, state member banks engage in unlimited branch banking, it will mean the eventual destruction of the national banking system . . . ." The 1924 Report (pp. 3-6) said at p. 4: "The question as to whether national banks may be granted the opportunity to meet the competition of state banks in intracity banking in my opinion involves the question of the perpetuation of the national banking system."

National banks are, of course, instrumentalities of the Federal Government and are subject to the paramount authority of the United States. Congress has the power to authorize National banks to establish branch banks regardless of State law. However, it has *not* done so. It ". . . adopted state law as a measuring stick for the establishment of branches by National banks." 12 U.S.C. 36(c)." *Commercial State Bank of Roseville* v. *Gidney*, 174 F. Supp. 770, 774 (D.C. D.C. 1959) aff'd. *per curiam* 278, F.2d 871 (D.C. Cir. 1960). Or, as stated by the Court of Appeals for the Sixth Circuit:

> "The history of federal legislation regarding branch banking and the statutes applying thereto leave a clear and definite impression that Congress intended, with respect to the location of branches, that a national bank should have no greater rights than it would if it were a state bank, and that a national bank was to be permitted to establish and operate a branch in a State only at such a point as it could, by express provisions of a State statute, establish and operate a branch if it were then a state bank." *National Bank of Detroit* v. *Wayne Oakland Bank*, 252 F.2d 537, 540, cert. denied, 358 U.S. 830 (1958).

This competitive equality was achieved in the McFadden Act of 1927 [1] and the Banking Act of 1933.[2] Throughout

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[1] In the McFadden Act, Congress amended the National Bank Act to authorize National banks to establish branches in the municipality wherein their main offices were located "if such establishments and operation are at the time expressly authorized to State banks by the law of the State in question . . ." 44 Stat. 1228, 12 U.S.C. 36(c). At the same time Congress restricted further branch expansion of State banks, which had elected to become members of the Federal Reserve System, by amending the Federal Reserve Act to prohibit new branches outside of the corporate limits of the municipality in which the main office was located. 44 Stat. 1229, 12 U.S.C. 321.

[2] In the Banking Act of 1933, National banks were permitted to establish branches outside the municipality in which the main office was located "if such establishment and operation are at the time authorized to State banks by the statute law of the State

the course of the debates on this legislation it was recognized that such competitive equality was imperative if the dual banking system was to survive. For example, in the debates on the McFadden Act of 1927, Representative McFadden, speaking on the floor of the House stated that ". . . this permission for National banks to meet the competition of State banks engaged in branch banking in certain large cities is absolutely vital to the maintenance of the National banking system." 65 Cong. Rec. 11298 (1924). Conversely, a proposal of the Senate Banking and Currency Committee in 1932 to allow National banks to establish branches irrespective of State law was vigorously opposed as resulting in the possible "elimination of the unit State bank", and destruction of the dual banking system.[1] The bill was passed only after the adoption of a floor amendment whereby National banks could establish branches only when authorized to State banks by the law of the State in question.[2]

The "new" bank approach of this case. The facts set forth in the Statement in the Petition (pp. 4-9) show that

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in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks . . ." 48 Stat. 189, 190, 12 U.S.C. 36. At the same time the restriction was removed on branches of States banks which were members of the Federal Reserve System, previously imposed by the McFadden Act of 1927. 48 Stat. 164, 12 U.S.C. 321.

[1] S. Rep. No. 584, 72nd Cong., 1st Sess. (1932); See, also, floor debates at 75 Cong. Rec. pp. 9890, 13002 (1932); 76 Cong. Rec. pp. 1449, 1997, 2079, 2080, 2090, 2205, 2206 (1932).

[2] 76 Cong. Rec. 1997, 2205, 2208, 2517 (1932). This amendment was never finally enacted into law because the bill itself did not pass the House prior to the expiration of the 72nd Cong. It was, however, included in a bill substituted for H. R. 5661 by the Senate Banking and Currency Committee, S. Rep. No. 77, 73rd Cong., 1st Sess. on S. 1631, p. 11 (1933), which did pass the following year, with the language on this matter emerging from the Conference Report. H. Rep. No. 254, 73rd Cong., 1st Sess., p. 29 (1933).

the directors of the Haddonfield National Bank, aware that a branch could not be established in Delaware Township, New Jersey, filed an application to form a new bank in Delaware Township, originally to be called the "Haddonfield Suburban National Bank of Delaware Township." An opportunity was afforded all Haddonfield stockholders to subscribe to the stock of the new bank and in the offering letter to the stockholders, its President announced with commendable candor that the new bank will be "an affiliate of the Haddonfield National Bank and that its affairs will be conducted by the same management and under the same policies as the Haddonfield National Bank." (R. 13a)

These facts, taken together with other circumstances of the case, led the State of New Jersey to report to the courts below that if an application for a new State banking charter were made under the same circumstances, it would be regarded in its substantive character as a branch application and rejected under the New Jersey statute governing branch applications. (See Affidavit of Charles R. Howell, Commissioner of Banking and Insurance of New Jersey, reflecting the advice of the Attorney General of New Jersey, R. 19a, and see dissent of Judge Bastian in the court below, Pet. p. 9a, quoting from the *amicus* brief filed by the State of New Jersey.)[1]

Importance of question presented. This case raises the question of whether the Congressional policy of competitive equality between National and State banks in branching precludes the Comptroller from approving an application by the directors of an existing National bank for a

[1] The branch banking laws of New Jersey so construed are contained in the Banking Act of 1948 of the State of New Jersey (N.J.S.A. 17: 9A-19). This statute provides that a State bank may establish a branch in any municipality in the same county where it maintains its principal office only if there is no banking institution which has a principal office or branch office located there.

new National bank charter under circumstances where, were it an application for a new State bank charter, it would be rejected as a forbidden branch facility under State law. If the Comptroller has the statutory authority to approve such an application, as the Majority below has held, National banks have a strong competitive advantage over State banks in all States where branch banking is prohibited or limited and where, under State law, such an application for a new bank would be considered a prohibited branch facility. In the Supervisors' opinion, such an approach patently evades the clear and unequivocal legislative purpose in the National Bank Act that the Comptroller follow State branch bank laws in order to preserve a competitive equality between National and State banks, and seriously threatens the competitive balance required for a continued functioning of the dual banking system.

2. The decision below is clearly erroneous.

The challenge to the Comptroller's authority in this case is *not* to an exercise of his discretion, e.g., whether a particular area is in need of an additional banking facility, but to his statutory authority to authorize the Respondent bank. The question is thus whether the Comptroller's statutory authority to charter a new bank under the provisions of the National Bank Act, 12 U.S.C. 27, is limited by Congressional policy underlying the branch provisions of the same Act, 12 U.S.C. 36(c), which establishes State law as the standard for National bank branches, and, if so, whether the Comptroller is accordingly without statutory authority to charter a new bank which a State has declared would constitute a forbidden branch under its law.

The Majority below answered this question by holding that the branch bank provisions of 12 U.S.C. 36(c) simply have no applicability to this case because the Respondent

bank was chartered as a new unit bank, with all of the attributes which distinguish a unit bank from a branch. This conclusion reflects an erroneous premise that the Comptroller's authority in the National Bank Act to charter new banks, 12 U.S.C. 27, is completely independent of the branch banking provisions in the same Act, 12 U.S.C. 36. It is axiomatic that a statute must be construed in a manner so as to produce a harmonious whole. *Western P.R. Corp.* v. *Western P.R. Co.*, 345 U.S. 247, 257 (1953); *Federal Power Commission* v. *Panhandle E.P.L. Co.*, 337 U.S. 498, 514 (1949); *Clark* v. *Hebersee Finanz-Korp.* 332 U.S. 480, 488 (1947). It is inconceivable to think that Congress, when it limited branch powers of National banks to those authorized State banks under State branch banking law in order to establish competitive equality in State and National bank branches, contemplated that the Comptroller could, at the same time, charter a new bank under circumstances specifically declared by a State to be a prohibited branch under its branch banking law. Such a result runs counter to the whole legislative scheme established by Congress to maintain competitive equality in branching which it achieved by the adoption of State law as the standard for National bank branches.

The Majority below also relied upon the fact that there is no prohibition against "affiliates" in the National Bank Act by which, it is presumed, the Court meant there is no prohibition against "chain banking" where one or more stockholders in one unit bank own stock in other unit banks, as in the instant case. The Supervisors agree. There is no blanket prohibition against chain banking in the National Bank Act, just as there is no such blanket prohibition in New Jersey's statutes, nor in those of any other State except Mississippi, Miss. Code, 1942 Anno. Vol. 4A § 5235. Chain banking, however, just as any otherwise legitimate form, may be unlawful when it is made the implement for avoiding a clear legislative

purpose.[1] Each State must decide, on the basis of its own branch banking laws, the circumstances under which a chain bank would contravene those laws, and the views of the various States may differ, which is to be expected because of the wide variety of legislative purposes expressed in the varying State branch banking laws.[2] Once a State has declared itself, however, as New Jersey has done in the instant case on the advice of its Attorney General, and has held that a particular chain bank approach violates the State branching law, the Comptroller is bound to follow that construction. This is so not because of State law *per se*, but because *Congress* has decided that the Comptroller should be bound by State law in the matter of branching in order to establish competitive equality between State and National banks. Under such a strong and unequivocal legislative mandate in the National Bank Act, the Comptroller simply lacks any statutory authority to go ahead and charter a new chain bank when a State has specifically declared that such a new chain bank, were it a State bank, would constitute a forbidden branch under State law.

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[1] E.g., the corporate form may always be disregarded whenever necessary to prevent evasion of the clear purpose of a statute. *Sekenley Distillers Corp.* v. *United States*, 326 U.S. 432, 437 (1946); *Chicago, M. & St. R. Co.* v. *Minneapolis C. & C. Assoc.*, 247 U.S. 490, 501 (1918); and cases cited in Fletcher *Cyclopedia Corps.*, Vol. 1, para. 45.

[2] See Appendix A. Compare for example, the position taken by the Supervisor of Banking in this case on the advice of the Attorney General of New Jersey (p. 6, *supra*), with *Daniel* v. *Best*, 224 Iowa, 1348, 279 N.W. 374 (Sup. Ct. Iowa, (1938)); also see the opinion of the Attorney General of Illinois, which is substantially in accord with the position taken by the State of New Jersey here and is set forth in full in Hearings before the Committee on Banking and Currency, House of Representatives, 84th Cong., 1st Sess., on H.R. 2674 (1955), at pp. 195-200.

CONCLUSION

For the reasons set forth above, the National Association of Supervisors of State Banks respectfully requests this Court to grant the Petition for a Writ of Certiorari, as requested by the Camden Trust Company, Petitioner in this cause.

Respectfully submitted,

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April 12, 1962

APPENDIX A

Summary Of Branch Banking Statutes Of The 50 States, Puerto Rico, and Virgin Islands

States Permitting Statewide Branch Banking

State	*Citation*
Alaska	Sess. Laws of Alaska, Section 3.208
Arizona	Arizona Revised Stat. Anno., Section 6-223
California	Calif. Financial Code Anno., Section 500
Connecticut	Gen. Stat. of Conn., Revision of 1958, Section 36-59
Delaware	2 Del. Code Anno., Title 5, Section 770
Hawaii	Revised Laws of Hawaii, Section 178-39
Idaho	Idaho Code, Section 26-1001
Louisiana	La. Revised Stat., Title 6, Section 54
Maryland	Anno. Code of Md. 1957, Art. 11, Section 65
Nevada	Nevada Revised Stat. Title 55, Ch. 660, Section 660.010
North Carolina	Gen. Stat. of N. C., Section 53-62
Oregon	Oregon Rev. Stat., Section 714.020.
Rhode Island	Gen. Laws of R. I., Section 19-1-13
South Carolina	Code of Laws of S. C., Section 8-57
South Dakota	S. D. Code of 1939, Section 6.0402
Utah	Utah Code Anno., Section 7-3-6
Vermont	Vermont Stat. Anno., Title 8, Section 501
Washington	Revised Code of Wash., Section 30.40.020
Puerto Rico	Laws of P. R. Anno., Title 7, Section 111 (i)

States Permitting Branch Banking Within Limited Areas

Alabama	Acts of 1953, 1955, 1957; Code of Alabama, Section 125 (1)
Georgia	Code of Ga. Anno., Section 13-203.1
Indiana	5 Burns Ind. Stat. Anno., Section 18-1707
Kentucky	Ky. Revised Stat., Section 287.180
Maine	Revised Stat. of Maine, Ch. 59, Section 19-C (1961 Supp.); Ch. 59, Section 124 (1961 Supp.)
Massachusetts	Mass. Gen. Laws Anno., Ch. 172, Section 11 (1961 Supp.) Ch. 172 A, Section 12
Michigan	Mich. Stat. Anno., Sections 23.762, 23.762 (1)
Mississippi	Miss. Code, Sections 5228, 5229
New Jersey	N. J. Stat. Anno., Section 17:9A-19
New Mexico	N. M. Stat. Anno., Section 48-2-17
New York	Book 4, Banking Law, Section 105

State	Citation
Ohio	Page's Ohio Revised Code Anno., Section 1103.09
Pennsylvania	Purdon's Pa. Stat. Anno., Title 7, Section 819-204.1
Tennessee	Tenn. Code Anno., Section 45-211
Virginia	Code of Va., Art. 3, Section 6-26

States Prohibiting Branch Banking

Arkansas*	Ark. Stat. 1947 Anno., Section 67-319
Colorado	Colo. Revised Stat., Section 14-13-1
Florida	Fla. Stat. Anno., Section 659.06
Illinois	Smith-Hurd Ill. Anno. Stats., Ch. 16-½, Section 106
Iowa*	Ia. Code Anno., Section 528.51
Kansas*	Gen. Stat. of Kansas Anno., Section 9-111 (1959 Supp.)
Minnesota	Minn. Stat. Anno., Section 48.34
Missouri*	Vernon's Anno., Mo. Stat., Section 362.105
Montana	Revised Codes of Mont. Anno., Section 5-1028
Nebraska*	Revised Stat. of Neb., Section 8-1,105
North Dakota*	N. D. Revised Code, Section 6-03-14
Oklahoma*	Okla. Stat. Anno., Title 6, Ch. 19, Section 461
Texas	Vernon's Civil Stat. of Texas Anno., Art. 342-903
West Virginia	W. Va. Code Anno., Section 3131
Wisconsin*	West's Wisc. Stat. Anno., Section 221.04

States With No Legislation Authorizing Branch Banking

New Hampshire
Wyoming
Virgin Islands

* These states permit certain offices with limited powers only.

Office-Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

October Term, 1961.

No. 831.

CAMDEN TRUST COMPANY,

Petitioner,

v.

RAY M. GIDNEY, COMPTROLLER OF THE CURRENCY,

and

DELAWARE VALLEY NATIONAL BANK OF DELAWARE TOWNSHIP,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

BRIEF FOR DELAWARE VALLEY NATIONAL BANK OF DELAWARE TOWNSHIP, RESPONDENT, IN OPPOSITION.

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April 30, 1962.

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IN THE

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OCTOBER TERM, 1961.

No. 831.

CAMDEN TRUST COMPANY,

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v.

RAY M. GIDNEY, COMPTROLLER OF THE CURRENCY,

AND

DELAWARE VALLEY NATIONAL BANK OF DELAWARE TOWNSHIP,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF FOR DELAWARE VALLEY NATIONAL BANK OF DELAWARE TOWNSHIP, RESPONDENT, IN OPPOSITION.

OPINIONS BELOW.

The findings of fact, conclusions of law, order and judgment of the United States District Court for the District of Columbia are found at pages 102a-107a of the Joint Appendix (R. 102a-107a).[1] The District Court did not hand down an opinion. The opinions of the Court of Appeals for the District of Columbia Circuit (App. of Petition, pp. 1a-9a) have not yet been reported.

1. Following the practice adopted by petitioner, references herein to pages of the Record will be to the pages so numbered of the Joint Appendix in the court below.

JURISDICTION.

The petition properly states the grounds on which the jurisdiction of this Court is invoked.

QUESTION PRESENTED.

When application is made to the Comptroller of the Currency to organize a new national bank, which will be affiliated at the time of its formation with an existing national bank by overlapping stock ownership and by identity of directors, is the Comptroller required to treat the application as one for the opening of a branch office of the existing bank?

STATUTES INVOLVED.

1. National Bank Act. The provisions of the National Bank Act applicable to the formation of national banking associations are found in R. S. §§ 5133, 5134, 5135, 5136 (as amended), 5168, 5169 and 5170; U. S. C., Title 12 §§ 21, 22, 23, 24, 26, 27 and 28. The pertinent provisions thereof are as follows:

> "§ 21. Formation of national banking associations; incorporators; articles of association
>
> Associations for carrying on the business of banking under this chapter may be formed by any number of natural persons, not less in any case than five. They shall enter into articles of association, which shall specify in general terms the object for which the association is formed, and may contain any other provisions, not inconsistent with law, which the association may see fit to adopt for the regulation of its business and the conduct of its affairs. These articles shall be signed by the persons uniting to form the association,

and a copy of them shall be forwarded to the Comptroller of the Currency, to be filed and preserved in his office."

"§ 22. Organization certificate.

The persons uniting to form such an association shall, under their hands, make an organization certificate, which shall specifically state:

First. The name assumed by such association; which name shall be subject to the approval of the Comptroller of the Currency.

Second. The place where its operations of discount and deposit are to be carried on, designating the State, Territory, or District, and the particular county and city, town, or village.

Third. The amount of capital stock and the number of shares into which the same is to be divided.

Fourth. The names and places of residence of the shareholders and the number of shares held by each of them.

Fifth. The fact that the certificate is made to enable such persons to avail themselves of the advantages of this chapter."

"§ 23. Acknowledgment and filing of certificate

The organization certificate shall be acknowledged before a judge of some court of record, or notary public; and shall be, together with the acknowledgment thereof, authenticated by the seal of such court, or notary, transmitted to the Comptroller of the Currency, who shall record and carefully preserve the same in his office."

"§ 24. Corporate powers of associations

Upon duly making and filing articles of association and an organization certificate a national banking association shall become, as from the date of the execution

of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power * * * [powers enumerated]."

"§ 26. Comptroller to determine if association can commence business

Whenever a certificate is transmitted to the Comptroller of the Currency, as provided in this chapter, and the association transmitting the same notifies the comptroller that at least 50 per centum of its capital stock has been duly paid in, and that such association has complied with all the provisions of this chapter required to be complied with before an association shall be authorized to commence the business of banking, the comptroller shall examine into the condition of such association, ascertain especially the amount of money paid in on account of its capital, the name and place of residence of each of its directors, and the amount of the capital stock of which each is the owner in good faith, and generally whether such association has complied with all the provisions of this chapter required to entitle it to engage in the business of banking; and shall cause to be made and attested by the oaths of a majority of the directors, and by the president or cashier of the association, a statement of all the facts necessary to enable the comptroller to determine whether the association is lawfully entitled to commence the business of banking."

"§ 27. Certificate of authority to commence banking

If, upon a careful examination of the facts so reported, and of any other facts which may come to the knowledge of the comptroller, whether by means of a special commission appointed by him for the purpose of inquiring into the condition of such association, or otherwise, it appears that such association is lawfully

entitled to commence the business of banking, the comptroller shall give to such association a certificate, under his hand and official seal, that such association has complied with all the provisions required to be complied with before commencing the business of banking, and that such association is authorized to commence such business. But the comptroller may withhold from an association his certificate authorizing the commencement of business, whenever he has reason to suppose that the shareholders have formed the same for any other than the legitimate objects contemplated by this chapter."

"§ 28. Publication of certificate

The association shall cause the certificate issued under section 27 of this title to be published in some newspaper printed in the city or county where the association is located, for at least sixty days next after the issuing thereof; or, if no newspaper is published in such city or county, then in the newspaper published nearest thereto."

2. Administrative Procedure Act. Section 10 of the Administrative Procedure Act of June 11, 1946, c. 324, 60 Stat. 243, U. S. C., Title 5 § 1009, provides in pertinent part:

"§ 1009. Judicial review of agency action

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

* * *

(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant

questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

3. The Petition accurately sets forth excerpts from the branch banking provisions of the National Bank Act, R. S. § 5155, as amended; U. S. C., Title 12, § 36. Similarly it accurately sets forth excerpts from §§ 1(2) and 19 of The Banking Act of 1948 of the State of New Jersey (N. J. S. A. 17:9A-1(2); 19). It is the view of the respondent and of both the courts below that these statutes have no application to this case.

STATEMENT OF THE CASE.

This litigation involves the formation of a new national bank in Delaware Township, Camden County, New Jersey. The new bank, as will be shown, will be affiliated initially with an existing national bank in the adjacent Borough of Haddonfield, and will open its office at a location at which the existing bank is barred by law from establishing a branch. The formation of the new bank has been strenuously opposed by Camden Trust Company, which has one of its branch offices in Delaware Township, primarily on the ground that the initial affiliation between the new bank and the existing bank in Haddonfield requires the former to be treated as a proposed branch office of the latter. A chronological summary of the facts follows.[2]

Under date of February 23, 1960, application was made to the Comptroller of the Currency to organize a national bank in Delaware Township, Camden County, New Jersey. The nine individuals who signed the application were at the time directors of the Haddonfield National Bank but in executing and filing it, they were not acting in their capacities as such (R. 33a, 39a-40a).

On November 21, 1960, the office of the Comptroller of the Currency advised the applicants of the preliminary approval of the application, subject to certain conditions relating to the holding of a meeting of the subscriber shareholders to elect a Board of Directors and approve expenses (R. 34a, 41a-43a).

On December 8, 1960, Mr. Horace G. Moeller, president of the Haddonfield National Bank, addressed a letter to the shareholders of that bank as follows (R. 8a, 13a, 35a):

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2. The Petition seeks review of an affirmance by the court below of the granting by the District Court of motions for summary judgment by the respondents. The material facts thus are to be found in the allegations of the pleadings and affidavits filed by the parties in the District Court.

"HADDONFIELD
NATIONAL BANK
Haddonfield, N. J.

December 8, 1960

"To the Shareholders of Haddonfield National Bank

"On many occasions your Board of Directors and Officers have been invited by the residents and business men of Delaware Township to extend banking facilities to that area by the establishment of a branch office in that fast growing municipality. Under the New Jersey banking law, to which we are subject with regard to branches, it is not permissible for a bank, other than in its home community, to establish a branch office in a municipality where a banking office already exists. It is possible, however, to apply for a charter to start a new bank where the need, both present and future, would appear to exist. In line with that reasoning your Board of Directors as individuals, applied and have received from the Comptroller of the Currency, preliminary approval to establish a new bank to be known as the Delaware Valley National Bank of Delaware Township, to be located in the Barclay Farm area.

"The new bank proposes to issue 22,500 shares ($10 par) stock @ $23.00 per share and the proceeds from the stock sale will be divided as follows:

Capital	$225,000.00
Surplus	225,000.00
Undivided Profits	67,500.00

"It is expected that the Delaware Valley National Bank will be an affiliate of the Haddonfield National Bank and that its affairs will be conducted by the same management and under the same policies as the Haddonfield National Bank.

"The Board of Directors of the Haddonfield National Bank feels this is a very worthwhile undertaking and as shareholders you are invited to subscribe for shares in the new bank. Will you please indicate on the stub, which appears at the bottom of this letter, *whether or not* you are interested in purchasing shares in the new bank and to what extent. We would appreciate hearing from you within the next 10 days and a self-addressed postage paid envelope is enclosed for your convenience when replying.

Sincerely,

H. Moeller
President"

Since 1953 Camden Trust Company had operated a branch which at the time the application for the new bank was filed was still the only banking facility in Delaware Township. To avoid competition and protect its monopoly, it protested to the Comptroller of the Currency both orally and in writing against the application to organize the new bank (R. 6a, 7a, 16a, 32a, 42a, 84a).

Pursuant to the instructions of the office of the Comptroller of the Currency and to the provisions of the National Bank Act the applicants on January 19, 1961, entered into Articles of Association and forwarded a copy to the Comptroller and made, acknowledged and transmitted to the Comptroller an Organization Certificate (R. 34a, 53a-55a, 56a-61a), whereupon the new bank became a body corporate, as provided by U. S. C., Title 12 § 24, with all the powers conferred upon it by that Section.

Under date of January 27, 1961, the office of the Comptroller of the Currency advised the new bank that its corporate existence had been established, but that before a certificate of authority to commence the business of banking could be issued, certain requirements had to be met relating to the furnishing of evidence that all its capital stock had been duly paid in, that the required subscription to stock

of the Federal Reserve Bank of Philadelphia had been made, and that capital funds had been expended only for proper organization expenses (R. 34a, 44a-46a).

On January 3, 1961, Camden had filed its complaint herein against the Comptroller, seeking a declaratory judgment that he is prohibited by the branch banking provisions of the National Bank Act (R. S. § 5155, as amended; U. S. C., Title 12 § 36) from authorizing the establishment of the new bank and its commencement of the business of banking, and further seeking a temporary restraining order and preliminary and permanent injunctions against such actions by the Comptroller (R. 5a-14a). The new bank was granted leave to intervene as a defendant (R. 28a-30a), and its answer to the complaint was thereafter filed (R. 31a-46a).

The three parties filed cross motions for summary judgment (R. 51a-65a, 66a, 79a), and various affidavits were filed.

After full argument, the District Court entered an order on August 12, 1961, finding that there were no material issues of fact and that the Comptroller and the new bank, the respondents, were entitled to summary judgment, granting their motions for summary judgment, and denying Camden's motions for preliminary injunction and for summary judgment (R. 102a). The order directed the Comptroller to submit findings of fact and conclusions of law in accordance therewith. The District Court's findings of fact and conclusions of law (R. 103a-106a) were filed on August 16, together with a final judgment. On motion by Camden, the District Court on the same day entered an order restraining the Comptroller from issuing a certificate authorizing the new bank to commence business pending the outcome of an appeal to the Court of Appeals, and directing Camden to file a $25,000 bond conditioned upon payment to the new bank of all loss and damage suffered by it as a result of the delay in its receipt of authorization to commence business, in the event that the appeal should ultimately be unsuccessful.

The appeal was argued on November 14, 1961, before a panel consisting of Circuit Judges Walsh, Danaher and Bastian. On January 18, 1962, the Court of Appeals affirmed the judgment of the District Court, Circuit Judge Bastian dissenting. The majority held that the new bank "clearly is not a branch of Haddonfield but is a completely separate entity . . ."; that the branch banking provisions of the National Bank Act have no applicability to this situation; and that the actions sought to be enjoined were "within the authority conferred by existing statutes". The majority opinion states:

> "It is not within our province to pass upon the desirability *vel non* of permitting a national bank to have an 'affiliate', as the appellant has here used the term. If such an affiliate is to be denied status, Congress must clearly say so."

The petitioner sought a rehearing before the Court of Appeals *in banc*. This petition was denied by order indicating that of the entire Court only Chief Judge Miller and Circuit Judge Bastian favored a rehearing.

Camden thereupon filed a motion to the Court of Appeals for a stay of the issuance of that Court's mandate, and a motion for a further stay of the issuance thereof, both of which were denied, Circuit Judge Bastian again dissenting.

The petitioner then filed an application to this Court for a stay of the issuance of the mandate of the Court of Appeals pending the filing and disposition of a petition for a writ of certiorari, which application was denied by Mr. Justice Clark on April 4, 1962.

ARGUMENT.

The standards fixed by this Court in its Rule 19(b) for the review on *certiorari* of decisions of the Courts of Appeals cannot be met in this case. There is no question of radical departure by either court below from the accepted and usual course of judicial proceedings. It is not suggested that the decision is in any way in conflict with applicable decisions of this Court. There is no state or territorial question involved. The decision of the Court of Appeals does not conflict with decisions of any other Court of Appeals. Moreover, as petitioner concedes (Petition, p. 12), such a conflict is precluded in the future because the Comptroller of the Currency can be sued only in the District of Columbia.[3]

There remains of the standards fixed by Rule 19 only one consideration upon which petitioner relies: that the Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court. The claim of such importance is indefensible, as will be demonstrated. Our argument to that effect will, however, be preceded by the development of another potent reason for denial of the petition, namely the correctness of the decision below.

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[3] The combined effect of the federal venue statute (62 Stat. 935; U. S. C., Title 28 § 1391) and Rule 4 of the Federal Rules of Civil Procedure (U. S. C., Title 28, F. R. C. P. 4), governing service of process, is to confine litigation attacking actions of the Comptroller to the District of Columbia. E.g., *Blackmar v. Guerre*, 342 U. S. 512 (1952); *Hartmann v. Federal Reserve Bank*, 55 F. Supp. 801, 810 (D. C. E. D. Pa. 1944); *Stein v. Delano*, 35 F. Supp. 260 (D. C. D. N. J. 1940); *Nesbitt Fruit Products, Inc. v. Wallace*, 17 F. Supp. 141 (D. C. S. D. Iowa 1936).

I.

The Decision Below Was Correct.

A. The Comptroller Properly Exercised His Statutory Discretion.

The petitioner challenges the power of the Comptroller of the Currency to approve the creation of a new national bank which is to be affiliated with an existing bank, or at lease his power "knowingly" to do so.[4] One looks in vain for any support for this contention in the law governing the creation of national banks. No suggestion that the Comptroller should consider this among the other factors he weighs is to be found.

Rather than upon any express provision of law Camden relies upon the legislative history of the 1927 and 1933 branch banking legislation to support this aspect of its argument, but its interpretation of that history is strained and false. The legislative history shows to the contrary that Congress recognized affiliates as a common phenomenon and fully legal.

Camden concedes, as it must, that at the time of enactment in 1927 of the statute first adding to the National Bank Act a limited branch banking authority, as well as at the time the present broader branch provisions were adopted in 1933, Congress was well aware of the existence of the institutions of chain and group banking and of the widespread and long-continued resort to those forms of multiple banking by national banks, which were theretofore absolutely prohibited from having branches, and by state banks in those jurisdictions where branching powers were limited or denied. Petitioner accurately states, with support from the Congressional Record, that the legislators saw dangers and evils in the chain and group bank situations. But what the Congress did was not to limit or deny

4. The inconsistency of this argument and the petitioner's argument that in authorizing the creation of new affiliated banks the Comptroller must apply branch bank principles is obvious. Its inconsistency with the position taken by the *Amicus Curiae*, The National Association of Supervisors of State Banks, is also significant.

the power of the Comptroller to permit the establishment of new chain or group affiliates, but instead to authorize national banks to establish branches. Clearly if the Congress had intended that the Comptroller be denied the power to creat affiliates, it would have done so by direct prohibition.

A more logical and accurate interpretation of the legislative history of the national bank branch laws than that offered by Camden can readily be found. The discussions on the floor of Congress in 1932 and 1933 make clear the nature of the evil which the legislators saw in bank chains and groups—they were their financial instability and their inability to withstand the great depression then afflicting the nation. Banks were failing, and where one bank in a chain failed, many others sometimes went under with it. Representative Steagall mentions one case where the failure of one bank in Georgia caused the failure of 180 other banks in the chain in one day (68 Cong. Rec. 2175). This was the consequence, of course, not of the mere fact that the 181 banks were affiliated, but of the dealings among the affiliates—the loans from affiliate to affiliate, the investment by one bank of its funds in securities of another, and the establishment of many banks on a capitalization adequate for only one. In Carlinfour, Branch, Group and Chain Banking (1931), the following text and footnote appear at page 89:

> "One may readily see * * * the many potential dangers that attended the grouping of control of a number of financial institutions under the supervision and administration of one or more individuals. Unscrupulous individuals frequently loaded the banks with paper from the agricultural or industrial speculations in which they were interested instead of diversifying their risk in accordance with the sound, fundamental principles of banking.
>
> "These chains were situated very largely in the rural districts, and the member banks of the chain were

principally small country banks. * * * Many of these chains have come to disaster through the failure of all of the banks which constituted them.[15]

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15. No information is available as to chain failures except insofar as it is known that many failed during the panic of 1907 and the years immediately following, and the economic depression of 1920-1921. * * * By reason of inter-relation of stock interests, the trouble of one institution was conveyed to others of the system, resulting in widespread collapses. * * *"

But what the proponents of the enlarged branching authority for national banks were trying to do was not to prohibit outright the formation of new group or chain affiliates, but to alleviate the dangers of the existing situation by enabling affiliates to merge and become branch offices and also to offer in the future an alternative, branch banking, to the existing national banks which were determined to get into multiple banking in order to compete on equal footing with their neighboring state-chartered banks. A typical exposition of this theory is found in the testimony of Comptroller Pole before the House Committee on Banking and Currency in 1930 during its inquiry into multiple banking in all its forms:

"*Mr. Goldsborough.* * * * I believe you stated, did you not, one reason for the extension of the right to establish branches of banks, was the fact that these groups were being formed that you did not approve of? * * *

"*Mr. Pole.* I have made objections to the group banking system * * *, my particular reasons being that it is difficult to supervise groups of banks * * *, and I think I have usually said as an ultimate system, I was very much in favor of branch banking, as against group banking.

"*Mr. Goldsborough.* Your idea is, I suspect, that if it were permitted further to extend branches * * *, that that would tend to abolish or do away with group banking, automatically?

"*Mr. Pole.* I feel quite sure that the groups themselves would prefer to operate under the branch system rather than the group system and I think that that would automatically change from one to the other. * * *

"*The Chairman.*' I think it would be helpful to the Committee if you will tell the committee just how you propose to stop group and chain banking under your plan of extending branch banking in trade areas.

"*Mr. Pole.* My plan is this: If banks are given the right to operate branch systems, the advantages would be such as to automatically convert these groups and chains into branches for the most part." *Hearings before House Committee on Banking and Currency (Branch, Chain, and Group Banking), 71st Cong., 2nd Sess. (1930), Vol. 1, pp. 246-249.*

Senator Glass also made this goal of the legislation clear in his statements, reported at 75 Cong. Rec. 9893:

"It is the view of the Committee, upon information presented, that if we do not adopt state-wide branch banking, the holding companies and the banks which they hold are going to be pretty soon wrecked. I do not know that it ought to be stated here, but we want to consider this whole problem in frankness. If the existing requirements of the law were put into effect by the Comptroller of the Currency, there are hundreds of banks which have not yet closed their doors, whose capital and surplus have been impaired, which would have to be closed up today, and unless we do something of this nature, that part of the country where these holding companies exist * * * are going to find themselves in inextricable difficulties. * * * They would convert their banks into branches. They would convert their holding companies into banks. They would convert the banks which they hold into branches, with the double liability. If they are as skillful as they have

seemed to us to be, they would manage to increase their capital holdings so as to insure the soundness and solvency of these banks as branches."

Thus one aspect of the Congressional approach to the dangers then regarded as inherent in the group and chain banking situations was to hold out to those involved or interested in those approaches to multiple banking a strong inducement to abandon them in favor of branch banking. But the legislation enacted in 1933 went beyond this in its efforts to alleviate the risks perceived in group and chain banking; it contained stringent regulations designed to prevent the practices which created the risks.

Section 2 of the 1933 Act (Act of June 16, 1933, c. 89, § 2, 48 Stat. 162, U. S. C., Title 12 § 221a) contained detailed definitions of the terms "affiliate" and "holding company affiliate". Section 13 of the Act (U. S. C., Title 12 § 371c) imposed strict limitations on the amounts which any member bank could lend to any affiliate, invest in the obligations of such affiliate, or lend on the security of a pledge of securities or obligations of such affiliate. It also required permitted loans to affiliates to be heavily collateralized.

Section 19 of the Act (U. S. C., Title 12 § 61) imposed controls on the voting of national bank shares by a holding company affiliate, it being required that a voting permit be first obtained from the Board of Governors of the Federal Reserve System. In applying for such a permit the affiliate must consent to examination into its affairs by the bank examiners in conjunction with their examination of all its bank affiliates. Also required was the investment of a substantial part of the holding company affiliate's funds in readily marketable assets other than bank stock, which amount was lessened if the shareholders of the holding company assumed its liability to assessment as a shareholder in its bank affiliates. Finally, the holding company applicant was required to divest itself of all holdings in securities companies and to agree not to acquire any such holdings thereafter.

Section 20 of the Act (U. S. C., Title 12, § 377) prohibits affiliation between member banks and securities companies.

Sections 27 and 28 of the Act (U. S. C., Title 12, §§ 161, 481) reinforce the voting permit provisions applicable to holding company affiliates by requiring national banks, in reporting their condition periodically to the Comptroller, to obtain similar reports from their affiliates for the Comptroller, and by authorizing bank examiners, in examining the affairs of national banks, to examine also the affairs of their non-member affiliates.

Obviously the Congress was unwilling to rely entirely on the allure of branch banking to eliminate the problems attendant on group and chain banking, and by these measures they attacked and eliminated the most evident and important ones—the exaggerated interdependence of the banks which were in the same chain or group, the risks inherent in involvement through affiliates in the securities business, and the lack of an opportunity for the bank examiners to make a comprehensive examination of an entire group or chain.

The inclusion in the very Act in which Congress gave broadened branching powers to national banks of these detailed curative measures directed at the dangers recognized and feared in group and chain banking can only be interpreted as recognition of the legality of affiliation of national banks with other banks. Further, it destroys Camden's contentions that the intent of Congress in enacting the 1933 Banking Act was to suppress and render illegal group and chain banking, and its contention that Congress recognized at the time that the Comptroller had no power to authorize the creation of affiliate banks.

Finally, two statutes other than the Act of 1933 discussed above provide evidence of continued Congressional familiarity with and approval of affiliation among banks. The Bank Holding Company Act of 1956, which will be

discussed below is obviously one such statute. The other is Section 8 of the Clayton Act, U. S. C., Title 15, § 19, which excepts from its general prohibition of interlocking directorates cases where an individual serves as a director of a Federal Reserve System member bank and of another bank if more than 50% of the common stock of both banks is owned directly or indirectly by the same persons. In effect a Congressional invitation to affiliate.

B. The Branch Banking Provisions of the National Bank Act Do Not Apply.

The fundamental fallacy in the Petitioner's case lies in its insistent invocation of R. S. Section 5155, as amended, U. S. C., Title 12, § 36. This statute was enacted in 1927 to permit for the first time the establishment by national banks of branch offices. As since amended, it permits national banks to set up branches in such locations as are permitted by State law to State banks. *It has no application to the formation of a new national bank, as in this case.* To establish this it is necessary only to point to the prefatory clause of Section 36, which states that contained in the Section are "The conditions upon which a national banking association may retain or establish and operate a branch or branches." The Sections of the Revised Statutes which do apply to the formation of new national banks, U. S. C., Title 12, §§ 21-28, nowhere make reference to the law applicable to branch banking.

Beyond the language of the statutes involved, there are basic practical differences between branch offices of a bank and separate banking corporations affiliated with a bank.

This respondent, the new bank, is and is intended to be, not a branch office of Haddonfield National Bank, but a separate corporate entity. It will differ from such a branch in many important respects. Quoting from the Comptroller's brief, the majority opinion of the Court of Appeals itemizes some of the more striking distinctions.

"The intervenor clearly is not a branch of Haddonfield but is a completely separate entity with certain distinguishing characteristics sufficiently so set up in the Government's brief as to justify our quoting verbatim:

> The capital structure of Delaware Valley is totally independent of that of Haddonfield National; the stock of Delaware Valley has been subscribed to and 'paid in' as required by 12 U. S. C. 53; Delaware Valley stockholders are subject to the individual liability described in 12 U. S. C. 63 [sic; repealed, 73 Stat. 457 (1959); see 12 U. S. C. § 64a], unrelated to their possible liability as shareholders in Haddonfield National; the Comptroller has assigned a name to Delaware Valley that is not susceptible of confusion with Haddonfield National; Delaware Valley will be located approximately two miles from the main office of Haddonfield National . . . the general business of banking to be conducted by Delaware Valley will 'be transacted in the place specified in its organization certificate'. (12 U. S. C. 81); deposits with Delaware Valley will be its liability not that of Haddonfield National; loan limitations on Delaware Valley will be those applicable to an independent bank, based on its own capital structure and totally independent of loan limitations applicable to Haddonfield National (12 U. S. C. 84); the limits of indebtedness which may be incurred by Delaware Valley will be as prescribed in 12 U. S. C. 82 and independent of similar limitations on Haddonfield National; the directors of Delaware Valley have been elected by its shareholders (12 U. S. C. 71), meet the citizenship, residence, and stock-ownership requirements specified in 12 U. S. C. 72, and: 'If the directors . . . shall knowingly violate, or knowingly permit any of [the] officers, agents, or servants . . . to

violate any of the provisions of [12 U. S. C. 21-214c], all the rights, privileges, and franchises of the association shall be thereby forfeited. 12 U. S. C. 93."

Moreover, the new bank will not be able to rely on Haddonfield National's deposit insurance to protect its depositors, but will have to make its own arrangements with F. D. I. C. It will not be able to rely on Haddonfield National's surplus to cover an impairment of its capital. Its depositors will not be able to have their checks certified or cashed at Haddonfield National's offices; their deposits with the new bank will not be recognized by or constitute liabilities of Haddonfield National. In short, they are and will be independent business ventures and different corporate entities, recognized as such in every respect by the law.[5]

The differences between these two contrasting forms of "multiple banking" were brought out repeatedly in the course of the relatively recent committee hearings in connection with the Bank Holding Company Act of 1956 (70 Stat. 133, U. S. C., Title 12, §§ 1841-1846).

More important, perhaps, than either the plain language of the controlling statutes or the long-recognized functional and practical differences between affiliates and branches is the unequivocal and steadfast refusal of Congress to extend the limitations controlling the establishment of branches to the creation of affiliate banks.

Group and chain banking, together with branch banking, have been collectively termed "multiple banking", and from their inception they have been the target of persistent

5. See the statement to the Senate Committee on Banking and Currency of George R. Boyles, Chairman of the Committee on Federal Legislation of the American Bankers Association, found at pp. 293-295 of *Hearings before a Subcommittee of the Committee on Banking and Currency, United States Senate (Control of Bank Holding Companies)*, 84th Cong., 1st Sess. (1955). This included an extensive tabular presentation of some of the differences between branch operations and bank holding company systems.

and violent attack by proponents of "unit banking". Even within the ranks of the proponents of "multiple banking" heated controversy has long continued over the relative merits of group and chain banking as opposed to branch banking. For a generous sampling of all views as they were expressed some thirty years ago see WILLIT, SELECTED ARTICLES ON CHAIN, GROUP AND BRANCH BANKING (1930).

It has long been generally recognized that in many cases groups or chains of affiliated banks grew up because of statutory restrictions on or prohibitions of branch banking.

> "Some difference of opinion has been observed as regards the effect of legal restrictions imposed upon branch banking in relation to the growth of group banking systems. It has been generally assumed that such developments are in anticipation of extensive legalized branch banking, and are a reaction against statutory provisions pertaining to branch banking. . . . Undoubtedly such factors are the most significant motives for group developments, but . . . the whole movement cannot be fully explained by the obstacles encountered in various instances by branch banking." CARTINHOUR, BRANCH, GROUP AND CHAIN BANKING, pp. 120-121 (1931).

> ". . . . Group banking is simply the result of the introduction into the banking field of the holding company device, which has been long known and much used in other businesses. Through the holding company a number of banks can be operated as practically one institution. Such an institution is very closely akin to a branch bank. Indeed, the opponents of group banking maintain that it is simply a device for evading the legal restrictions on branch banking." WILLIT, SELECTED ARTICLES ON CHAIN, GROUP AND BRANCH BANKING, p. 10 (1930).

"In addition to branch banking, groups and chains also are forms of multiple-office banking which may influence any tendency toward concentration in banking. A number of bank groups include branch systems, but in certain States that prohibit branch banking, group systems have served as substitutes for branch banking: for instance, groups in Minnesota and Montana held 61 percent and 52 percent, respectively, of the total deposits of all commercial banks in the State. At the end of 1961, . . . these systems operated in 14 of the 18 States where branch banking is prohibited or strictly limited." *Special Staff Report of the Board of Governors of the Federal Reserve System to the Select Committee on Small Business of the United States Senate*, "*Recent Developments in the Structure of Banking*", *January 5, 1962, p. 9.*

As demonstrated by the second of these quotations, the attack on chain and group banking as an evasion of statutory restrictions on branch banking, which is precisely the attack which the plaintiff is making in this case, was being made more than thirty years ago. During the following twenty-five years the pressure for Federal legislation controlling the activities and growth of chain and group banks, and in particular of the most prevalent form of multiple banking, the bank holding company system, has been unremitting. Never absent from proposed legislation on the subject has been the subjection of future acquisitions of affiliates to the existing geographical limitations on branch banking.

For a record of the general concern with the growth of multiple banking which prevailed thirty years ago see *Hearings Before House Committee on Banking and Currency (Branch, Chain, and Group Banking), 71st Cong. 2nd Sess. (1930), Vols. 1 & 2.* The continuing legislative interest in

the immediately subsequent years is reflected in the *Legislation Note*, "*Branch, Chain, and Group Banking*", in 48 Harv. L. Rev. 659 (1935).

Nearly every session of Congress following 1935 produced one or more bills on this subject, and ultimately a comprehensive law was enacted in 1956, the Bank Holding Company Act of 1956 (Act of May 9, 1956, c. 240, 70 Stat. 133, U. S. Ca. Title 12 § 1841-1846). Senate Report No. 1095 (U. S. Code Cong. and Admin. News, 84th Cong., 2nd Sess., 1956, Vol. 2, p. 2482 at pp. 2484-2486) summarizes the history of efforts to enact laws on the subject from 1938 to 1956.

The Bank Holding Company Act of 1956 was the result of a determined and comprehensive review of the institution of multiple banking. Several different bills were introduced in both the House and the Senate. Two of these, H. R. 6227 and S. 880, contained a provision denying the Federal Reserve Board authority to permit any bank holding company to acquire any voting shares in any additional bank "except (i) within geographic limitations that would apply to the establishment of branches of banks under the statute law of such State." *Hearings Before a Subcommittee of the Committee on Banking and Currency, United States Senate (Control of Bank Holding Companies), 84th Cong., 1st Sess. (1955), pp. 3, 25.* The injection of branch banking standards in this manner was objected to before the Senate subcommittee by the Chairman of the Board of Governors of the Federal Reserve System, and by Governor Robertson of said Board. *Ibid.* pp. 45, 47-48, 77-78, 80-81. The Comptroller of the Currency himself voiced similar objections, *ibid.* p. 82, and presented memoranda on behalf of the Treasury Department to the same effect, *Ibid.* pp. 85, 89-90. A number of representatives of bank holding companies also complained of this aspect of the bills. E.g., *ibid.* pp. 141-142, 145-146, 272, 320-321. The American Bankers Association likewise protested the application of branch standards to acquisition of affiliates by

holding companies. *Ibid.* pp. 291-295. On the other hand representatives of the Independent Bankers Association of America, frequently referred to in the hearings as the sponsor of the bills, voiced ardent support for the inclusion of the provision in question and reiterated the time-worn charge that bank holding companies had developed as a device to evade the laws on branch banking. *Ibid.* pp. 104-105, 107, 111, 112-129.

Thus the issue was squarely presented whether the limitations imposed by State law upon the establishment by banks of branch offices were to be given application to the acquisition by holding companies of new bank affiliates. The decision of the Congress was negative, and no such limitation appears in the Act.

For Camden Trust to suggest that the policy underlying the law applicable to national bank branching requires the application of that law to cases of the creation of new bank affiliates where Congress has specifically and directly rejected the same proposal in enacting the Bank Holding Company Act, is absurd. It is indeed overreaching to ask the judicial branch of the government to establish as law what the legislative has considered repeatedly and as often flatly rejected.

C. New Jersey Law, If Applicable, Would Not Prohibit the Chartering of the New Bank.

The law governing the establishment of national banks, unlike that applicable to creation of national bank branches, does not incorporate by reference the provisions of State law, and consequently the provisions of New Jersey law, so insistently invoked by Camden and the *amici*, are not relevant to the issues in this case. Nevertheless it is significant that legislative history in New Jersey itself shows no intent to apply branch banking concepts and territorial limitations to the acquisition by holding companies of additional subsidiaries, much less to the formation of new bank affiliates of existing banks.

Holding companies and multiple banking are not strangers to New Jersey and its legislature. At the end of 1929 there were in New Jersey 15 group bank systems involving 59 banks, according to information compiled by the Federal Reserve Board. *Hearings Before House Committee on Banking and Currency (Branch, Chain and Group Banking), 71st Cong., 2nd Sess., 1930, vol. 1, p. 174.* Another study in 1954 by the Federal Reserve Board, which was confined to holding company situations, showed 10 such companies in New Jersey, involving 13 banks with 32 branches. This report was declared not to be exhaustive. *Hearings Before a Subcommittee of the Committee on Banking and Currency, United States Senate (Control of Bank Holding Companies), 84th Cong., 1st Sess., 1955, pp. 56-60.*

Against this background, in 1957 New Jersey enacted a comprehensive law regarding ownership of bank stocks, L. 1957, c. 79, p. 133, N. J. S. A. 17:9A-344 to 354. Any company which owns 25% or more of the stock of any bank may acquire no more than a 10% interest in any other bank. Thus holding companies are effectively limited to one subsidiary. However, the law contains no provision preventing the acquisition of ownership or control or the formation of any number of banks by a single individual or by a group of individuals. The sort of affiliation that is here to exist between Delaware Valley and Haddonfield National Bank has not been proscribed by this statute, nor has it been subjected to the territorial limitations applicable to branch banking.

In addition, the provisions of Article IV of the New Jersey Banking Act of 1948 governing the grant of charters for state banks, N. J. S. A. 17:9A-9 et seq., reveal no legislative objection to the acquisition by shareholders of an existing bank of the stock initially issued by the new institution, nor any justification under such circumstances for the application of branch banking limitations.

The claim has been vigorously advanced by the State of New Jersey throughout these proceedings that if the directors of a New Jersey state bank sought to create an affiliate in a location foreclosed by the presence of an existing bank to the opening of a branch, the application would be considered as a branch application and rejected by the Commissioner of Banking and Insurance of New Jersey. The sole authority for this is an affidavit of the present Commissioner as to how he would treat such an application if it were to be presented to him. Such a hypothetical statement of intention would be entitled to little weight at best. In this case its probative value is nullified by the fact of record that the same Commissioner permitted in 1958 precisely that which, it is now claimed, he would forbid. At that time application was made for a new state bank charter for the State Bank of Rahway. The chief organizer of the proposed new bank was President of the existing Community Bank of Linden, which was barred by New Jersey law from opening a branch at the proposed Rahway location. This organizer testified before the Commissioner that 5 of the 9 directors of the new bank would also be directors of the Community Bank of Linden. Testimony in protest was given by the President of another bank on the grounds that control of the new bank would be in the group controlling the Community Bank of Linden, and that the formation of the new bank was a circumvention of the statutory bar against a Community Bank branch in Rahway. The Commissioner nevertheless granted the charter (R. pp. 97a-101a).

D. The Administrative Procedure Act Does Not Authorize Judicial Review.

A final ground for approval of the decision below—one which the Court of Appeals did not find it necessary to consider, since it approved the action of the Comptroller which Camden challenges—is that judicial review or re-

straint of the chartering of the new bank by the Comptroller is not warranted.

Ever since the decision of this Court in *Adams v. Nagle*, 303 U. S. 532 (1938), the only permissible grounds for judicial review of official actions by the Comptroller have been fraud or a mistake of law so exaggerated as to amount to a total disregard of the statutory mandate or to constitute acting "in the teeth" of the statute.

Section 10 of the Administrative Procedure Act (60 Stat. 243 U. S. C., Title 5, § 1009), in its introductory clause, denies judicial review of "agency action . . . by law committed to agency discretion". This in no way conflicts with the guiding principles established in *Adams v. Nagle*. Facts which would support a holding that agency action "wholly disregards" or "acts in the teeth of" the mandate of the governing statute, in the words of Mr. Justice Roberts in that case, would under the Administrative Procedure Act call for a holding that the agency has exceeded the limits of "agency action . . . by law committed to agency discretion".

The statutes governing the formation of national banks vest broad discretion in the Comptroller to approve or disapprove. See the language of R. S. § 5169; U. S. C., Title 12, § 27:

> "If, upon a careful examination of the facts so reported, *and of any other facts which may come to the knowledge of the comptroller . . . it appears* that such association is lawfully entitled to commence the business of banking, the comptroller shall give to such association a certificate. . . . But the comptroller *may* withhold . . . his certificate . . . *whenever he has reason to suppose that the shareholders have formed the same for any other than legitimate objects contemplated by this chapter.*" (Emphasis added.)

See also *Apfel v. Mellon*, 59 App. D. C. 94, 33 F. 2d 805 (1929), *cert. den.* 280 U. S. 585 (1929), holding that the

statutory power to "approve" the chartering of Edge Act corporations connoted a discretionary power in the Federal Reserve Board to look beyond fixed statutory requirements, into such matters as character and competence of management.

Having attacked the action of the Comptroller in an area thus confided to his discretion, Camden could succeed only by showing a flouting of a clear statutory mandate limiting the scope of his discretion. Instead of such a clear statutory mandate Camden offers only strained deductions of Congressional intent which themselves fly in the face of the plain words of the statutes and the unmistakable record of legislative intent.

II.

There Is No Important Question of Federal Law.

Camden Trust's claim that this case presents a most important question of statutory construction under the National Bank Act — the sole basis for its petition for a writ of *certiorari* — has been shown totally to disregard banking history.

The Congress and the banking community have been aware for more than thirty years that where bank branches are prohibited or severely limited by law, new banks, affiliated in varying manner and degree with existing institutions, have invariably been chartered. Throughout the course of the growth of chain and group banking it has been apparent, and the subject of comment, that many groups or chains of affiliated banks grew up because of statutory restrictions on or prohibitions of branch banking. Awareness of this fact appears throughout the record of the 1930 Congressional hearings concerned with branch, chain and group banking.

In 1933 Congress took positive steps to eliminate certain abuses and dangers attendant upon some group and chain systems, and in 1956 additional legislative controls were imposed. At the latter date Congress specifically rejected determined efforts to subject the creation of addi-

tional banking affiliates to the geographical limitations applicable in the jurisdiction to the establishment of bank branches.

Despite the intimate familiarity of the Congress with every aspect of group and chain banking and the tireless attacks leveled at affiliate banking by determined opponents for more than a quarter of a century, it has never been supposed that under existing banking laws the Comptroller of the Currency or State bank supervisory officials are required, when confronted with an application for the formation of a new bank having stockholders or directors in common with an existing bank, to treat the new bank as a branch of the existing one. The novelty of such a proposition speaks more of unsound legal theory than it does of the importance of the question it presents. What the Congress and the banking community have accepted as normal for so long cannot be thus transformed at this late date into a burning issue.

The petitioner specifically claims importance for this case on the ground that the decision confers upon national banks an "enormous competitive advantage" over state banks. This assumes, without support from the record or in fact, that the action of the Comptroller which the two lower courts have approved finds no parallel in the actions of any State bank supervisory agency. But in jurisdictions which, like Florida and Texas, prohibit branch banking[6] the existence of widespread chains and groups of affiliated banks, both State and national, is well known. Thus the decision of the Court of Appeals gives national banks no competitive advantage over State banks in such jurisdictions, but rather preserves their competitive equality. In those jurisdictions where State-wide branch banking is permitted[7] there could obviously be no competitive advantage, even if we assume, *arguendo*, that a State bank might be

6. There are 15 such jurisdictions. See Appendix A to Brief of *Amicus Curiae*, the National Association of Supervisors of State Banks.

7. There are 19 such jurisdictions. *Ibid.*

denied the privilege of organizing affiliates.[8] And as to those jurisdictions in which branch banking is permitted, but subject to geographical limitations[9]—typified by New Jersey, the State here involved—the record includes no more than protestations by that State's administrative officer as to what action would be taken in that State under circumstances such as those of this case, which are refuted by the facts shown of record that New Jersey has recently chartered an affiliate State bank in a strikingly similar case.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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April 30, 1962

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8. Note that the only State which prohibits chain banking is Mississippi. Brief of *Amicus Curiae*, the National Association of Supervisors of State Banks, p. 8.

9. There are 15 such jurisdictions. See Appendix I to Brief of *Amicus Curiae*, the National Association of Supervisors of State Banks.

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In the Supreme Court of the United States

OCTOBER TERM, 1961

CAMDEN TRUST COMPANY, PETITIONER

v.

RAY M. GIDNEY, COMPTROLLER OF THE CURRENCY, AND DELAWARE VALLEY NATIONAL BANK OF DELAWARE RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT, COMPTROLLER OF THE CURRENCY, IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 831

CAMDEN TRUST COMPANY, PETITIONER

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RAY M. GIDNEY, COMPTROLLER OF THE CURRENCY, AND DELAWARE VALLEY NATIONAL BANK OF DELAWARE TOWNSHIP

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BRIEF FOR RESPONDENT, COMPTROLLER OF THE CURRENCY, IN OPPOSITION

OPINIONS BELOW

The district court (R. 107)[1] filed no opinion. The opinions of the court of appeals (Pet. App. 1a-9a) are not yet reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 10a) was entered on January 18, 1962. A timely peti-

[1] Except where otherwise indicated, the record references herein are to the Joint Appendix filed in the court below.

tion for rehearing *en banc* was denied by order dated February 20, 1962 (Pet. App. 11a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether limitations in New Jersey law applicable to branch banking limit the discretionary authority of the Comptroller of the Currency to approve and charter a new national bank that will be affiliated with an existing national bank.

STATUTES INVOLVED

Pertinent provisions of the National Bank Act, as amended, are set forth in the Appendix, *infra*, pp. 14-16.

STATEMENT

Pursuant to the National Bank Act, 12 U.S.C. 21-28, an application to the Comptroller of the Currency, under date of February 23, 1960, was executed and filed by nine individuals seeking the Comptroller's approval to organize a new national bank in Delaware Township, Camden County, New Jersey (R. 7, 39-40). At the time of application, the individual applicants were serving as directors of the Haddonfield National Bank. The application to organize the new bank was processed by the Comptroller's office in the usual way, as outlined in 12 C.F.R. 4.1. A field investigation was conducted by representatives of the Comptroller, joined by representatives of the Federal Reserve Board and the Federal Deposit Insurance Corporation. On November 21, 1960, the Comptroller advised the applicants that he had given his preliminary ap-

proval of their application to organize a new national bank under the title, "Delaware Valley National Bank of Delaware Township." (R. 41.)

The Articles of Association and the Organization Certificate of the Delaware Valley National Bank were executed on January 19, 1961 (R. 53-55), and were subsequently filed with the Comptroller; Delaware Valley thereupon became a body corporate (see 12 U.S.C. 24, App., *infra*, p. 44). Pursuant to the terms of 12 U.S.C. 27, (App., *infra*, p. 15), before Delaware Valley can commence the business of banking, the Comptroller must inquire into the conditions of the Association and determine whether the Association is lawfully entitled to commence the business of banking; if so, the Comptroller shall give to the Association a certificate that the Association has complied with the provisions of the National Bank Act and is authorized to commence the banking business.

On January 3, 1961, the Camden Trust Company, a State bank organized under the laws of New Jersey, brought suit in the United States District Court for the District of Columbia seeking declaratory relief and an injunction prohibiting the Comptroller from issuing a certificate of authority to Delaware Valley (R. 1, 5-10). The complaint charged that there was no need or justification for another bank in the area now being served by a branch bank of the Camden Trust Company; that the application preliminarily approved by the Comptroller was a manifest subterfuge to circumvent the provisions and purposes of the National Bank Act and New Jersey law by introducing a fa-

cility in the Delaware Township that "* * * for all practical purposes constitute a branch facility of the Haddonfield National Bank. Issue of a Certificate of Authority in such a case," it was asserted, "is contrary to law, beyond the defendants' authority, and a clear abuse of his discretion" (R. 8). A prayer for a temporary restraining order (R. 9) was abandoned by Camden when the Comptroller agreed to an administrative stay.

On April 6, 1961, the Delaware Valley National Bank was given leave to intervene as a party-defendant (R. 28, 30). On cross-motions for summary judgment the district court, on August 12, 1961, sustained the motions of the Comptroller and Intervenor (R. 102). The district court concluded that the Comptroller "* * * was authorized, pursuant to the provisions of Section 21-28 of the National Bank Act [12 U.S.S. 21-28] * * * to approve, within the exercise of his discretion, the establishment of the 'Intervenor'" and that "the exercise of this discretion is not subject to judicial review."[2] The district court further held that the branch banking provisions of the National Bank Act (12 U.S.C. 36, App., *infra*, p. 16) are inapplicable to the case and that the plaintiff lacked standing to challenge the Intervenor's corporate

[2] Though the government did not deem it necessary in the court of appeals to argue at length the various alternative grounds for the decision of the district court, the government reserves the right to argue as an alternative ground for affirming the judgment below that petitioner, a state bank complaining only of possible competitive injury, has no legal standing to challenge the authority of the Comptroller to charter a new national bank.

existence or the defendants' authority to approve the establishment of a new bank (R. 106).

On Camden's appeal,[3] the judgment of the district court was affirmed, Judge Bastian dissenting.[4] The court of appeals held, contrary to Camden's argument, that both as a matter of fact and as a matter of law, Delaware Valley was not a "branch bank" within the meaning or intent of the branch banking provisions of the National Bank Act (12 U.S.C. 36); that 12 U.S.C. 36 has no applicability to the fact situation disclosed on the record in this case; and, adverting to the fact that Delaware Valley was affiliated with Haddonfield National Bank through common directors and partial stock ownership, the court stated (Pet. App. 7a):

> It is not within our province to pass upon the desirability *vel non* of permitting a national bank to have an "affiliate." * * *. If such an affiliate is to be denied status [as a national bank], Congress must clearly say so. It is sufficient for our disposition of the present controversy to observe that what was done was within the authority conferred by the existing statutes. * * *

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[3] On Camden's motion, the district court restrained the Comptroller from issuing to Delaware Valley a certificate of authority to commence the business of banking pending the outcome of Camden's appeal. It was further ordered, however, that Camden file a bond in the amount of $25,000 conditioned upon the payment to Delaware Valley of all loss and damage suffered by it as a result of the delay in receiving the certificate of authority in the event that Camden's appeal is ultimately unsuccessful (R. 109).

[4] The difference between Judge Bastian and the majority of the court of appeals was not over the legal point decided by the court, but rather upon a different interpretation of the facts of the case

The judgment of the court of appeals was rendered on January 18, 1962. Thereafter, Camden filed a timely petition for rehearing *en banc* which was denied on February 20, 1962, two judges dissenting.[5]

ARGUMENT

Petitioner is a state bank which by this suit seeks to avoid the competition of a bank lawfully organized pursuant to the express terms of the National Bank Act, 12 U.S.C. 21-28. Beyond the economic importance of the case to petitioner and to the potentially competitive Intervenor, there is involved no issue of overriding public importance or significance which calls for this Court's review. There is no conflict of decisions, not just because the Comptroller may be sued only in the District of Columbia (see Pet. 12), but because no state bank has ever before suggested in a suit against the Comptroller or against a national bank, suable where it does business, that a partial common stock ownership between two or more national banks and common directors of national banks makes one or the other a "branch bank" subject to state geographical limitations applicable to the establishment and operation of branch banks.

1. On the merits, petitioner seeks to superimpose upon the Comptroller's unquestioned authority to char-

[5] On February 23, 1962, Camden moved for a stay of the court of appeals' mandate pending the filing of a petition for a writ of certiorari in this Court. The motion was opposed by the Comptroller and the Intervenor. By order, dated March 20, 1962, the motion was denied by the court of appeals. A similar application for stay of issuance of the mandate was made to this Court, and, by order dated April 4, 1962, was denied by Mr. Justice Clark.

ter a new bank (Pet. 3) the limitations of New Jersey law applicable to the establishment of branch banks (N.J. Stat. Ann. 17:9A15).

Petitioner argues that the newly organized Delaware Valley National Bank is a "branch bank" and, hence that the state limitations, adopted by way of 12 U.S.C. 36(c) (App., *infra*, p. 16), serve to limit the Comptroller's authority to charter a new bank, as authorized by 12 U.S.C. 21-28. The court below was clearly correct in rejecting petitioner's novel arguments. The Delaware Valley National Bank, neither in fact nor in law, is or could be a "branch bank" of the Haddonfield National Bank, as petitioner suggests. Thus as the court of appeals held, the limitations of 12 U.S.C. 36 and of New Jersey law upon the establishment of branch banks have "no applicability to the situation disclosed on this record * * *" (Pet. App. 7a).[6]

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[6] The decision of the court below that 12 U.S.C. 36 is inapplicable to this case, is consistent with a recent decision of the Court of Appeals for the Fifth Circuit, *State of Texas* v. *National Bank of Commerce of San Antonio*, 290 F. 2d 229, certiorari denied, 368 U.S. 832.

The *amicus* National Association of Supervisors of State Banks, takes the position that the question whether Delaware Valley is a "branch" of Haddonfield National must be resolved by reference to the law of the State of New Jersey. The *amicus* Association argues (Br. 9):

> Each State must decide, on the basis of its own branch banking laws, the circumstances under which a chain bank would contravene those laws, and the views of the various States may differ, which is to be expected because of the wide variety of legislative purposes expressed in the varying State branch banking laws. Once a State has declared itself, however, as New Jersey has done in the instant case on the advice of its Attorney General, and has held that a particular chain bank ap-

Petitioner urges here (Pet. 10), as it did below, that "form" should be disregarded and that the "substance of the transaction" recognized. But even apart from the independent corporate "form" of Delaware Valley, the substance of the transaction is that Delaware Valley is not and could not be a "branch bank" of Haddonfield National. The capital structure of Delaware Valley is totally independent of that of Haddonfield National; the stock of Delaware Valley has been subscribed to and "paid in" as required by 12 U.S.C. 53; the Comptroller has assigned a name to Delaware Valley that is not susceptible of confusion with Haddonfield National; Delaware Valley will be located approximately two miles from the main office of Haddonfield National (R. 15, 6); the general business of banking to be conducted by Delaware Valley will "be transacted in the place specifed in its organization certificate" (12 U.S.C. 81); deposits with Delaware Valley will be

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proach violates the State branching law, the Comptroller is bound to follow that construction.

Significantly, neither the petitioner nor the *amicus* State of New Jersey join in this argument. They apparently recognize that 12 U.S.C. 35(c), which makes state law applicable to determine whether a national bank can establish a branch, only applies when a proposed facility is a "branch" as a matter of federal law. Indeed, 12 U.S.C. 36(f) (App., *infra*, p. 16), specifically defines the inclusive scope of the term "branch" as used in 12 U.S.C. 36(c), as a matter of federal law.

With respect to the views of the State of New Jersey, suffice it to say that, although after the inception of this litigation the Commissioner of Banking and Insurance of New Jersey took the view that the new facility would be a forbidden branch under New Jersey law, nevertheless, in 1958, the Commissioner approved an application for a state bank charter for the State Bank of Rahway under factual circumstances strikingly similar to those in the present case (R. 97-101).

its own liability, not that of Haddonfield National; loan limitations on Delaware Valley will be those applicable to an independent bank, based on its own capital structure and totally independent of loan limitations applicable to Haddonfield National (see 12 U.S.C. 84); the limits of indebtedness which may be incurred by Delaware Valley will be as prescribed in 12 U.S.C. 82 and will be independent of similar limitations on Haddonfield National; the directors of Delaware Valley have been elected by its shareholders (see 12 U.S.C. 71), meet the citizenship, residence, and stock-ownership requirements specified in 12 U.S.C. 72. Compliance with these provisions is insured by 12 U.S.C. 93, which provides that "If the directors * * * shall knowingly violate, or knowingly permit any of its officers, agents, or servants * * * to violate any of the provisions of [12 U.S.C. 21-214c], all the rights, privileges, and franchises of the association shall be thereby forfeited * * *."

From the foregoing enumeration, it is impossible to say that the Comptroller, in approving the application of Delaware Valley, has approved, in any sense whatsoever, a branch of Haddonfield National or that Delaware Valley could be conducted as a branch were its management disposed to do so. In the 31 years that national banks have been authorized to establish and operate "branches," petitioner is the first of the many thousand banks in the competing state banking systems to suggest that an affiliate bank and a branch bank are legally the same and that 12 U.S.C. 36 and state law operate as a limitation on the Comptroller's

charter authority or limit the authority of an affiliate bank to conduct the business of banking.[7]

2. The distinctions between branch and chain or affiliate banking have been long recognized by Congress, and there is no indication that Congress either equates or confuses the two systems as petitioner seeks to do.[8] By the Banking Act of 1933, in which Congress broadened the authority of national banks to establish and operate branch banks, Congress also legislated specifically with respect to "affiliates" of national banks and other member banks of the federal reserve system. Contrary to petitioner's view (Pet. 14-19), Congress by that Act never intended to subject affiliation by national banks to the state limitations and restrictions applicable to branch banking. See, *e.g.*, Secs. 2, 13, 20, 27, 28(a), (b), of the Banking Act of 1933, 12 U.S.C. 221a, 371c, 377, 161, 481.

Furthermore, Section 8 of the Clayton Act, 15 U.S.C. 19, and Regulation L of the Board of Governors of the Federal Reserve System, 12 C.F.R. Part 212, are also important in demonstrating statutory recognition

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[7] That the Comptroller's office has never considered 12 U.S.C. 36 as a limitation of his authority is evidenced by the fact that the official records of the office disclose that Comptrollers of the Currency have for many years approved applications for the chartering of new national banks affiliated with existing banks (R. 96).

[8] In the debates preceding the passage of the Banking Act of 1933, Senator Carter Glass stated (76 Cong. Rec. 1998):

> Mr. President: There may now be established chain and group banking systems. There are many such systems. I am not addressing myself to anybody whose confusion of mind is such that he can not differentiate a chain and group banking system from a branch banking system. They are, of course, entirely different. * * * There is no law against chain and group banking. * * *

of national bank affiliation. These provisions prohibit interlocking directors, officers and employees of member banks of the Federal Reserve System, but contain a number of exceptions, one of which permits such interlocking relationship for banks "more than 50 per centum of the common stock of which is owned directly or indirectly" by the same persons (15 U.S.C. 19(4); see 12 C.F.R. 212.2(d)(4)).

The recent Bank Holding Company Act of 1956, 12 U.S.C. 1841-1848, also indicates an intention by Congress to treat affiliates differently from branch banks. As introduced and passed by the House of Representatives, H.R. 6227, 84th Cong., 1st Sess., which became the Bank Holding Company Act of 1956, contained a provision that no application should be approved which would permit

> (2) any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank, except (i) within geographic limitations that would apply to the establishment of branches of banks under the statute law of such State, or (ii) unless such acquisition is at the time authorized by the statute law of such State by language specifically granting such authority affirmatively, and not merely by implication.

The Senate rejected this provision and adopted instead a provision which confined bank holding company operations to a single state, except where state

law expressly permits out-of-state holding companies. The Senate version ultimately became law (Sec. 3(d) of the Bank Holding Company Act of 1956, 12 U.S.C. 1842(d)). In explaining this section on the floor of the Senate, Senator Robertson, Sponsor and Manager of the legislation, stated (102 Cong. Rec. 6753):[9]

> The committee also decided against the inclusion of a provision in the bill which would automatically apply State laws concerning branch banking to bank-holding company operations. This provision was contained in the House bill and was advocated by the Independent Bankers Association. A bank branch is, by form, ownership, and functions, vastly different from a bank-holding company affiliate.

[9] At this point Senator Robertson inserted into the Record a chart (see 102 Cong. Rec. 6753-6754), prepared by the American Bankers Association showing clearly the many differences between branch banking and holding company operations in such factors as corporate organization, stockholders, supervision, board of directors, management, capital structure, deposits, loan limits, loanable funds, and termination.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY, 1962.

APPENDIX

The National Bank Act, as amended, 12 U.S.C. 21, *et seq.*, provides in relevant part as follows:

12 U.S.C. 21:

Associations for carrying on the business of banking under this chapter may be formed by any number of natural persons, not less in any case than five. They shall enter into articles of association, which shall specify in general terms the object for which the association is formed, and may contain any other provisions, not inconsistent with law, which the association may see fit to adopt for the regulation of its business and the conduct of its affairs. These articles shall be signed by the persons uniting to form the association, and a copy of them shall be forwarded to the Comptroller of the Currency, to be filed and preserved in his office.

12 U.S.C. 24:

Upon duly making and filing articles of association and an organization certificate a national banking association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power—* * *

12 U.S.C. (Supp. III) 26:

Whenever a certificate is transmitted to the Comptroller of the Currency, as provided in this chapter, and the association transmitting the same notifies the comptroller that all of its capital stock has been duly paid in, and that such association has complied with all the provisions of this chapter required to be complied with before an association shall be author-

ized to commence the business of banking, the comptroller shall examine into the condition of such association, ascertain especially the amount of money paid in on account of its capital, the name and place of residence of each of its directors, and the amount of the capital stock of which each is the owner in good faith, and generally whether such association has complied with all the provisions of this chapter required to entitle it to engage in the business of banking; and shall cause to be made and attested by the oaths of a majority of the directors, and by the president or cashier of the association, a statement of all the facts necessary to enable the comptroller to determine whether the association is lawfully entitled to commence the business of banking.

12 U.S.C. 27:

If, upon a careful examination of the facts so reported, and of any other facts which may come to the knowledge of the comptroller, whether by means of a special commission appointed by him for the purpose of inquiring into the condition of such association, or otherwise, it appears that such association is lawfully entitled to commence the business of banking, the comptroller shall give to such association a certificate, under his hand and official seal, that such association has complied with all the provisions required to be complied with before commencing the business of banking, and that such association is authorized to commence such business. But the comptroller may withhold from an association his certificate authorizing the commencement of business, whenever he has reason to suppose that the shareholders have formed the same for any other than the legitimate objects contemplated by this chapter.

12 U.S.C. 36 provides in pertinent part:

(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks. * * *

* * * * * *

(f) The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.

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IN THE

Supreme Court of the United States

October Term, 1961.

No. 831.

CAMDEN TRUST COMPANY,

Petitioner,

v.

RAY M. GIDNEY, COMPTROLLER OF THE CURRENCY,

and

DELAWARE VALLEY NATIONAL BANK OF DELAWARE TOWNSHIP,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

REPLY BRIEF OF PETITIONER TO BRIEFS IN OPPOSITION OF COMPTROLLER OF THE CURRENCY AND INTERVENOR

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1961.

No. 831.

CAMDEN TRUST COMPANY,

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v.

RAY M. GIDNEY, COMPTROLLER OF THE CURRENCY, AND DELAWARE VALLEY NATIONAL BANK OF DELAWARE TOWNSHIP.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

REPLY BRIEF OF PETITIONER TO BRIEFS IN OPPOSITION OF COMPTROLLER OF THE CURRENCY AND INTERVENOR.

Introductory Statement.

The central issue in this case is whether, on the uncontroverted facts adduced by petitioner, the Comptroller of the Currency was under a duty to reject the application for the proposed "new" bank here involved on the ground that the application in substance and effect constituted an attempt to obtain a forbidden branch bank. In pressing its

contention on this issue, petitioner urges that the National Bank Act must be read as an integrated whole so that the new bank provisions (12 U. S. C. §§ 21-27) can not be used to evade the language and purpose of the statute's branch banking provisions (12 U. S. C. § 36(c)).

In both courts below, the Comptroller's primary defense was that, under the 1864 statute (12 U. S. C. § 27), he had absolute power to grant a new bank charter. Since an argument that the form of the application alone should control would be unpalatable and since he could not argue that the proposed "new" facility was a *bona fide* independent bank, the Comptroller was forced to contend that he has at all times possessed the absolute power knowingly to charter affiliates. This was the statutory contention which he urged in his motion for summary judgment, and pressed in briefs and argument in both courts below. Thus, the issue framed by the parties in the courts below was one of federal statutory law.

Intervenor, in its brief in opposition, faces the statutory issue presented by this case and attempts to construe the National Bank Act as empowering the Comptroller, without any restrictions, to authorize "affiliates". The petition for certiorari, we submit, refutes this construction and we will further discuss specific aspects of intervenor's contention herein, *infra*, pp. 8-10. The Comptroller, in his brief in opposition, does not squarely face the statutory issues which were mooted below but, rather, makes every attempt to avoid presenting to this Court the same broad claim of statutory power which he so insistently urged in the lower courts. Instead, he argues that the "new" bank is not in form a branch and is therefore not, in fact, a branch.[1] He makes this argument as a means of avoiding a

1. In support of this argument, the Comptroller enumerates the formal consequences of separate incorporation. He does not discuss, or even advert to, the uncontroverted facts of record advanced by petitioner which show the occasion for the "new" bank application, the identity of control between the "new" bank and Haddonfield National, the location of the "new" bank within the competitive territory of Haddonfield National and the other facts

discussion of the National Bank Act and the nature of the power which Congress has vested in him in that statute. He has thus here assumed the very issue in question and none of the material to which he does advert warrants this assumption.

A. The Comptroller's Brief in Opposition.

1. In **National Bank of Detroit v. Wayne Oakland Bank**, 252 F. 2d 537 (C. A. 6, 1958) *certiorari denied*, 358 U. S. 830, the Comptroller of the Currency argued for a reading of the branching statute, 12 U. S. C. § 36(c), which would have permitted him to authorize a national bank branch in any locality where a state bank had a branch regardless of state law provisions prohibiting other state banks to branch in localities already served by a state or national bank branch. In other words, the Comptroller argued for a parallel system of branching rather than a system of precise equality of competition between state and national banks. Thus, had the instant case arisen prior to the decision in **Wayne Oakland**, *supra*, the Comptroller's position would have been that he had the power to authorize Haddonfield National to branch in Delaware Township, because petitioner had a branch in that township.

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discussed in the petition, pp. 4-6. In stressing form and picking among the consequences of that form, the Comptroller completely ignores the principle that the corporate privilege may never be invoked to defeat the purpose of the statute under which the privilege is sought. Petition, p. 10, fn. 10. Whether this principle is violated depends upon the underlying substance of the transaction as this Court has recognized on many occasions. For example, in **Concord First National Bank v. Hawkins**, 174 U. S. 364 (1899), this Court stated that, if one national bank were permitted to acquire the stock of another, there would be, in form, two separate corporate entities but the acquired bank would be, in substance, a branch.

Here, the controlling facts should be recognized to be not only that the intention is that the "new" bank be run under common management and control with Haddonfield National but that, under the law of fiduciary relationships, it must be. 3 Fletcher, **Cyclopedia Corporations** (Perm. Ed.) pp. 838, 848, 850.

That position was foreclosed to him by the decision in **Wayne Oakland** which read 12 U. S. C. § 36(c), the branching statute, as embodying a policy of precise competitive equality. The Court of Appeals for the Sixth Circuit held that where the state branching law permits branching to a state bank only where there are no existing branches in the locality, then 12 U. S. C. § 36(c), incorporating that state law by reference, permits branching to a national bank only where there are no existing branches, state or national, in the locality.[2]

It is, thus, the decision in **Wayne Oakland** which, in reality, gives rise to the claim of power made by the Comptroller in this case. What the decision in **Wayne Oakland** forbade the Comptroller to do under 12 U. S. C. § 36(c), he is here trying to do under 12 U. S. C. § 27. And the means by which he intends to avoid state law restrictions on branching, as is apparent in the instant case, is favorably to entertain an application for a controlled "affiliate", where a branch would be prohibited by 12 U. S. C. § 36(c). In the light of this attempt to avoid **Wayne Oakland**, the Comptroller's misconstruction of petitioner's position becomes plain. Petitioner does not argue that the Comptroller's power to charter *bona fide* new banks must be measured by state law, as the Comptroller asserts. Comptroller's Brief in Opposition, pp. 6-7. Petitioner does argue that the state law measure selected by Congress in 12 U. S. C. § 36(c) cannot be avoided or nullified through a manipulation of form.

2. As we have stated, the core of this case is whether the National Bank Act must be read as an integrated whole—whether Section 27, the new bank provision, can be used by the Comptroller to defeat the Congressional purpose and policy embodied in 12 U. S. C. § 36(c), the branching provision. *Cf.* **Helvering v. N. Y. Trust Co.**, 292 U. S. 455, 464-465

2. The New Jersey statute here involved is substantially the same, with regard to branching restrictions, as the Michigan statute involved in **Wayne Oakland**.

(1934). The Comptroller does not attempt to meet this issue squarely; he never discusses or tries to draw support from these sections of the National Bank Act. He merely asserts that he "* * * has never considered 12 U. S. C. § 36 as a limitation of his authority * * *"[3] under Section 27, regardless of the circumstances in which that section is invoked. In connection with this assertion, he points to an affidavit which he filed in the district court (R. 96).

There is a well established rule that "* * * rulings, interpretations and opinions * * *" by those charged with the administration of a statute "* * * constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. * * *" **Skidmore v. Swift & Co.**, 323 U. S. 134, 140 (1944). But the Comptroller cannot avail himself of this rule. He conducts no hearings, publishes no opinions or interpretations in connection with the grant or denial of charters. *Cf.* **Commercial State Bank of Roseville v. Gidney**, 174 F. Supp. 770 (D. C. D. C., 1959) *affirmed per curiam* and petition for rehearing denied, 278 F. 2d 871 (C. A. D. C., 1960). There is thus no body of regulations, published interpretations or opinions to which courts and litigants may resort. **United States v. Shreveport Grain & Elevator Co.**, 287 U. S. 77, 84 (1932); 1 Davis, **Administrative Law Treatise** (1958), § 5.06.

The fact here is that this case marks the first occasion on which a Comptroller of the Currency has publicly claimed absolute power under Section 27 without reference to Section 36(c)—the power to use the new bank authority to provide a physical facility in the form of an affiliate to a national bank which desires but cannot obtain a branch. There is no occasion on which the Comptroller has advised Congress of this asserted power or its exercise. Each of the nine instances referred to in the Comptroller's affidavit

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3. Comptroller's Brief in Opposition, p. 10, ftn. 7.

in this case was reported to Congress only as the chartering of a new bank and no mention was made of affiliation. Annual Report, 1944, Table #3, p. 23, Charter #14497; Annual Report, 1946, Table #3, p. 22, Charter #14552 and #14567; Annual Report, 1950, Table #4, p. 29, Charter #14650; Annual Report, 1955, Table #3, p. 54, Charter #14753, and p. 53, Charter #14759; Annual Report, 1956, Table #3, p. 74, Charter #14799.[4] In the light of the almost universal Congressional condemnation of affiliate and chain banking,[5] and the intensely considered and debated legislative action which added a carefully defined branching privilege to the basic system of unit independent national banks,[6] it would surely seem that the Comptroller's *ad hoc* affidavit is entitled to no weight.[7]

3. The Comptroller also asserts that his view—that he can exercise power under 12 U. S. C. § 27 without reference to 12 U. S. C. § 36(c)—is "* * * consistent with a recent decision of the Court of Appeals for the Fifth Circuit, *State of Texas v. National Bank of Commerce of San Antonio*, 290 F. 2d 229, *certiorari denied*, 368 U. S. 832." Comptroller's Brief in Opposition, p. 7, ftn. 6. There is no warrant for the Comptroller's reliance on that case. There, the State of Texas sought to read 12 U. S. C. § 36(c) as preventing the Secretary of Treasury from designating a national bank as a government financial agent to perform limited banking functions at a federal military installation. The Court of Appeals for the Fifth Circuit rejected this argu-

4. It should be noted that the cautious wording of the Comptroller's affidavit falls far short of meeting the issue in this case. The affidavit speaks of chartering **new** national banks "affiliated with existing banks" but does not say whether the "existing banks" are state or national, whether the affiliation took place by virtue of acquisition of ownership after approval, or whether the charters were issued in circumstances comparable to those here presented.

5. Petition, pp. 18-19.

6. Petition, pp. 14-16.

7. *Cf.* **United States v. Leslie Salt Co.**, 350 U. S. 383, 396 (1956).

ment. The Solicitor General stated to this Court (Memorandum for the United States as *Amicus Curiae* in Opposition, October Term, 1961, No. 247, pp. 4-5):

> "* * * The court of appeals was correct in rejecting petitioner's attempt to equate the limited banking facilities operated by respondents with a commercial branch banking operation, and thus to bring into operation 12 U. S. C. 36(c) (Pet. App. 11) which permits national banks to establish and operate branch banks only where state law permits. There are similarities between the facilities respondents maintain and a branch bank but there are also fundamental differences.[2] Only by a strained interpretation can 12 U. S. C. 36, dealing with commercial branch banks, be read as limiting the 'reasonable duties' a national bank may perform, under 12 U. S. C. 90 and 290, when acting as a financial agent of the government and as a depositary of public money.

"2. A commercial branch bank is ordinarily a self-sustaining economic enterprise; the limited facilities provided by respondents, pursuant to 12 U. S. C. 90 and 12 U. S. C. 265, on the other hand, are, in reality, subsidized by the government which provides, without charge, banking quarters, military guards, janitorial services, and utilities. Moreover, for operating losses sustained, the banks are, in effect, reimbursed by the Treasury." *

4. Contrary to the Comptroller's assertion (Comptroller's Brief in Opposition, p. 10), petitioner neither confuses nor equates branch banking and chain or group banking. Nor does Congress. Unit banks and branches are authorized forms of banking, coming into existence as the result of official charter and approval. Chain or group banking systems have not come into existence through official charter or approval, but, rather, have resulted from private activity, such as stock purchase or acquisition, over which there was

* Footnote quoted from text of Solicitor General's Memorandum.

no governmental control. Petition, pp. 16-18. Congress has accorded entirely separate treatment to the areas of creation and authorization of new banks and branches, and the existence of chain and group bank systems. On the one hand, Congress retained the concept of the unit independent national bank while adding a carefully controlled branching privilege. Petition, pp. 14-16. On the other hand, it has imposed controls, in 1933 and again in 1956, to the maximum extent legally and factually possible on what was and is viewed as an evil. Petition, pp. 18-19.[8]

If there is a confusion here, it is the Comptroller's confusion in seeking to find in the Congressional attempts to control the evils attendant on chain and group banking, a source of power in himself to participate in the formation of chains and groups of banks.[7] The point is illustrated by placing in context and completing the quoted remark of Senator Glass in the 1933 debates cited in the Comptroller's Brief in Opposition at p. 10, ftn. 8. Senator Glass, the principal proponent of the bill which became 12 U. S. C. § 36(c), was refuting indiscriminate attacks on all forms of multiple banking, including branch banking, by, among others, Senator Huey Long. Senator Glass went on to say that chain banking "* * * has gone on for years and has proved a menace wherever tried." 76 Cong. Rec. 1998.

B. Intervenor's Brief in Opposition.

In the main, intervenor argues that the imposition by Congress of controls on chain and group banking, rather

8. The separateness of treatment, evident from the reports which accompanied the 1933 legislation (Petition, pp. 15, 18), is underscored by the Minority Views filed by Senator Norbeck, Chairman of the Senate Committee on Banking and Currency, on behalf of himself and other members of the Committee. S. Rept. 584, 72d Cong., 1st Sess. Part II. The Minority Views strongly supported those portions of the proposed legislation which imposed controls on "affiliates," but disagreed just as strongly with the section which authorized branching. Senator Norbeck and those with him adhered to the concept of the independent unit national bank.

than the abolition of these forms of multiple banking, somehow gives rise to a power in the Comptroller to authorize these forms of banking institutions without reference to 12 U. S. C. § 36(c). We have answered this contention above. As we have shown, groups and chains of banks came into existence as a result of private activity; Congress rejected, as impossible, proposals to eliminate or abolish these systems but did impose, in 1933 and again in 1956, the maximum amount of control legally and practically possible (Petition, pp. 18-19). A power in the Comptroller cannot be spelled out from these factors.

"Nor does the universal condemnation by Congress of chain and group banking permit intervenor's argument that Congress, in 1933, was simply offering branch banking as an alternative form of multiple banking to national banks. In making this latter argument, intervenor refers to a colloquy between then Comptroller of the Currency Pole and Representative Goldsborough at the 1930 hearings on branch, chain and group banking." Intervenor's Brief in Opposition, pp. 15-16. Representative Goldsborough, a staunch supporter of pure unit banking (Hearings, *supra*, Vol. I, p. 42) opposed Pole's recommendation that he be empowered to authorize branch banking. The Congressman, accordingly, questioned Pole's contention that authorized branch banking would cure the evils attendant upon chain and group banking by inducing existing chains or groups to convert to branch systems. Mr. Pole admitted, sensibly enough, that many of those who formed groups or chains would not be interested in coming under a carefully supervised banking system.[9] *Cf.* McFadden, **The Chain Bank Crash in Georgia**, 19 Am. Bankers Ass'n. J., 137 (1926).

Clearly, as we have shown (Petition, pp. 15, 17), one of the purposes of the 1933 branching legislation was to pro-

9. Hearings Before the Committee on Banking and Currency of the House of Representatives on Branch, Chain and Group Banking (1930), 71st Cong., 2d Sess.

vide an authorized and controlled form of multiple banking in which the drive toward bigness could be realized. But it is a far cry from this to suggest that a realization of this objective had the simultaneous result of recognizing chains and groups as fully equal and approved systems of multiple banking. And it is an even farther cry to suggest that Congressional provision of an authorized and controlled form of multiple banking created a power in the Comptroller to augment the very system against which Congress had so deliberately provided an alternative.

C. The Attack on the Good Faith of the Commissioner of Banking and Insurance of New Jersey.

Throughout this proceeding, the State of New Jersey has strongly supported petitioner's position. Briefs have been submitted in both courts below by the Attorney General of that State and an affidavit by the Commissioner of Banking and Insurance, prepared after consultation with the Attorney General, was filed (R. 47a-50a). That affidavit stated, *inter alia*, that "* * * if a State bank in New Jersey sought to achieve a new banking facility in a municipality statutorily foreclosed to additional branching, by means of charter application for a new bank to be run by the same management, under the same policies, and as an affiliate of such State bank, the application would be considered as a branch application and rejected as such" (J. A. 49a-50a). As the argument on behalf of New Jersey made plain, this view was not a mere matter of policy but was compelled by the Attorney General's best appraisal of New Jersey statutory and decisional law. Stenographic Transcript, pp. 67, 69.

The Comptroller and the intervenor suggest to this Court that, on one occasion in 1959, the Commissioner of Banking and Insurance of New Jersey had, in fact, authorized a new banking facility, the State Bank of Rahway, in precisely the same circumstances as those here involved. Comptroller's Brief in Opposition, p. 8, ftn. 6; Intervenor's

Brief in Opposition, p. 27. The probative value of the Commissioner's affidavit is said by the intervenor thus to be nullified by the "fact of record". Brief in Opposition, p. 27.

It is the "fact of record" which should be disregarded. The Deputy Attorney General was handed the Comptroller's and intervenor's material, dealing with the Rahway Bank, at the district court hearing in this case on Monday, August 7, 1961. Stenographic Transcript, p. 72. The Deputy Attorney General was given five days in which to respond to this new matter. On August 11, 1961, a supplementary memorandum dealing with the accusation was forwarded to the district court. On August 12, the district court order granting the Comptroller's motion for summary judgment was mailed out.[10]

Neither court below advertised to the Rahway Bank matter. But petitioner does not believe that the accusations here renewed by both the Comptroller and the intervenor should go unchallenged. Further the office of the Attorney General of New Jersey has specifically requested petitioner to present its position on this charge to this Court.

The procedure followed in the district court, and the time sequence, did not permit New Jersey to make a formal record by way of affidavits. The supplementary memorandum filed by New Jersey analyzed the relationship between the Community Bank of Linden and the State Bank of Rahway to show that Rahway has different top management from Community and substantially different stock ownership; that Rahway was not intended to be, and was not represented to be, a bank that would operate under the same management and policies as Community. New Jersey provides public hearing, after notice, on bank applications, with an absolute right of judicial review. The issue of the

10. As shown by the docket entries, there was a time lag in the actual filing by the clerk of both these papers. The district court order was filed on August 14, the supplementary memorandum by New Jersey on August 15. R. 3a.

relationship between Community and Rahway was considered at the hearing held on the application and the Commissioner decided, on all the facts, that Rahway would operate independently—a position entirely consistent with his affidavit in this case. No appeal from his decision was taken.

Conclusion.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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